SUPREME COURT, U. S.

FILED

DEC 16 1974

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-749

ART THEATRE GUILD, INC., and SHERPIX, INC.,
Petitioners,

v.

LARRY E. PARRISH, THOMAS F. TURLEY, JR., *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RALPH J. SCHWARZ, JR.,
22 East 40th Street,
New York, N. Y. 10016.

EDMUND C. GRAINGER, JR.,
501 Fifth Avenue,
New York, N. Y. 10017.

FRIERSON M. GRAVES, JR., and
MICHAEL F. PLEASANTS,
First National Bank
Building, Suite 2020,
Memphis, Tenn. 38103.
Attorneys for Petitioners.

Index to Petition for Writ of Certiorari.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
A. The order to show cause seizure and preliminary evidentiary determination of obscenity	3
B. The civil action to enjoin enforcement of the subpoenas: Court on October 6, 1972, quashes subpoenas to produce prints and negative but adequately protects government	4
C. The nationwide seizures of prints and negative October 31-November 7, 1972	5
D. The Sixth Circuit order and judgment of September 24, 1974	6
Basis for Federal Jurisdiction in Court of First Instance and Raising of Federal Questions	7
REASONS FOR GRANTING THE WRIT.	
I. The Sixth Circuit precedent will permit any United States attorney by preliminary determination of obscenity to halt nationwide distribution and exhibition long before final adjudication. The Sixth Circuit solution of the right to make copies does not and will not cure the prior restraint in this or any similar case and does not comport with *Heller*	7

Page

Summary of Point I 7

I-A. The seizure of the master negative and 9 to 10 additional film prints on the basis of a preliminary evidentiary finding of obscenity completely halted the nationwide distribution and exhibition and is a clear unconstitutional prior restraint 8

I-B. The remand solution of the Sixth Circuit does not and will not cure the First Amendment violation in this or any similar case. It does not comport with *Heller* and the dangers of this precedent are enormous 10

I-C. The government was and is amply protected by the October 6, 1972 court order that the master negative and all prints be held subject to subpoena 12

I-D. The Sixth Circuit correctly held that this civil action was an action independent of the criminal prosecution 13

II. 18 U.S.C. 371 is overbroad as applied to justify seizure of the negative and film prints throughout the country 15

Conclusion. The writ of certiorari should be granted 18

Appendix A—September 24, 1974 Decision and Opinion of the Sixth Circuit 19

Appendix B—September 24, 1974 Judgment of the Sixth Circuit entered on the September 24, 1974 Opinion 28

Page

APPENDIX C—December 1, 1972 Opinion of the United States District Court Western District of Tennessee 30

APPENDIX D—United States Constitution and Statutes Involved: First Amendment; Fifth Amendment, Due Process Clause; 18 U.S.C. 371; 18 U.S.C. 1462 43

APPENDIX E—Charging Part of Count One of Indictment in *United States v. Gerber, Sherpix, et al.*, Cr. No. 72-45, D.C. W.D. Tennessee 45

APPENDIX F—Charging Part of Count One of the Indictment in *United States v. Hamling*, No. 10791 D.C. S.D. Cal. 48

TABLE OF CASES.

American News Company v. Ladas, 454 F. 2d 1237 (6th Cir. 1972) 14

Astro Cinema Corp. v. Mackell, 422 F. 2d 293 (2d Cir. 1970) 8

Cinema Classics, Ltd., v. Busch, 339 F. Supp. 43 (C.D. Cal. 1972), aff'd *sub nom.* Busch v. Cinema Classics, Ltd., 409 U. S. 807 (1972) 13

Cogen v. United States, 278 U. S. 221 (1928) 14

Demich, Inc., v. Ferdon, 426 F. 2d 643 (9th Cir. 1970) vacated and remanded *sub nom.* Ferdon v. Demich, Inc., 401 U. S. 990 (1971) 9

Dowling v. Collins, 10 F. 2d 62 (6th Cir. 1926) 14

Page

Freedman v. Maryland, 380 U. S. 51 (1965) 8

Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931) 14

Gooding v. Wilson, 405 U. S. 518 (1972) 16

Hamling v. United States, U. S. , 41 L. Ed. 2d 590 (1974) 6, 16

Heller v. New York, 413 U. S. 483 (1973) .. 6, 8, 10, 11, 12, 13

Jenkins v. Georgia, U. S. , 41 L. Ed. 2d 642 (1974) 16

Keyishian v. Board of Regents, 385 U. S. 589 (1967) 16

Lord v. Kelley, 223 F. Supp. 684 (D.C. D.Mass. 1963), appeal dism'd 334 F. 2d 742 (1st Cir. 1964) 14

Miller v. California, 413 U. S. 15 (1973) 16

Paris Adult Theatre I v. Slaton, 413 U. S. 49 (1973) 8

Perlman v. United States, 247 U. S. 7 (1918) 14

Rea v. United States, 350 U. S. 214 (1956) 14

Tyrone, Inc., v. Wilkinson, 410 F. 2d 639 (4th Cir. 1969) 9, 14

United States v. Thirty-Seven Photographs, 402 U. S. 363 (1971) 8

CONSTITUTIONAL PROVISIONS CITED.

	Page
United States Constitution:	
First Amendment	6
Fifth Amendment, Due Process Clause	3

U. S. STATUTES CITED.

18 U.S.C. 1462	3, 4, 6, 7
18 U.S.C. 371	3, 6, 7, 15, 16, 17, 18
28 U.S.C. 2101 (c)	2
28 U.S.C. 1254 (1)	2
28 U.S.C. 1331	7

In the

Supreme Court of the United States

October Term 1974.

Art Theatre Guild, Inc., and Sherpix, Inc.,

Petitioners,

v.

Larry E. Parrish, Thomas F. Turley, Jr., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners, Art Theatre Guild, Inc., and Sherpix, Inc. (plaintiffs), respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit filed September 24, 1974, and the opinion on which they are based. That order affirmed the December 1, 1972 order of the District Court, Western District of Tennessee, which denied plaintiffs' motion for a preliminary mandatory injunction seeking a return of the master negative and some ten to twelve prints of the motion picture "School Girl" seized throughout the country but remanded to permit plaintiffs to make copies of the prints.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, and the judgment entered thereon are printed as Appendices A and B. The opinion of the District Court for the Western District of Tennessee was not reported but is printed as Appendix C.

Jurisdiction.

The order, opinion and judgment of the Sixth Circuit was filed on September 24, 1974. This petition for certiorari in this civil action is filed within 90 days of that date (28 U. S. C. 2101 [c]). An application for certiorari time extension for thirty (30) days was filed and granted by Mr. Justice Potter Stewart up through November 23, 1974. That application for time extension, made out of excessive caution, specifically stated that petitioners' filing was in no way a concession that this case "is a criminal case governed by Rule 22(2)" and that this "action is governed by" 28 U. S. C. 2101(c). Hence, this petition is timely filed.

This court's jurisdiction is invoked under 28 U. S. C. 1254(1).

Questions Presented for Review.

1. A federal district court judge in Tennessee in August, 1972, made a preliminary probable cause determination after an evidentiary hearing that the motion picture "School Girl" was obscene and that the seized print be retained. On October 6, 1972, the court held that subpoenas for the master negative and approximately ten to twelve additional prints could *not* require their simultaneous production in Tennessee because it would suppress "the showing of the film" but directed that all material not be altered or destroyed, that a record be kept of the location of all prints and the negative subject to further order of the court.

A. Are First Amendment rights violated where the United States Attorney three weeks after the October 6, 1972 order, uses that same August 1972 preliminary determination of obscenity to seize the master negative, and

ten (10) to twelve (12) prints throughout the country and completely halts the distribution and exhibition nationwide?

B. Are First Amendment rights to return of material vindicated by the right to make copies where the United States Attorney continues to hold the master negative, there is no practical limitation on the United States Attorney's power to repeat the same practice, and the direct laboratory costs of reproducing the prints are approximately $10,000?

2. Is 18 U. S. C. 371 as applied overbroad under the First Amendment in purportedly justifying nationwide seizures because the alleged unlawful conspiracy object is exhibition throughout the United States?

Constitutional Provisions and Statutes Involved.

First Amendment; due process clause Fifth Amendment; 18 U. S. C. 1462 and 18 U. S. C. 371 (printed in Appendix D).

Statement of the Case.

A. The order to show cause seizure and preliminary evidentiary determination of obscenity.

On May 26, 1972, on the application of respondents (hereafter defendants), the District Court in Tennessee issued an order to show cause directing the possessors of the film "School Girl" to show cause why the film should not be declared obscene. A print of the film was seized by the United States Marshal and brought to court. The seizure of that print is *not* involved in this case.

A preliminarily probable cause evidentiary hearing was held. The court in August, 1972, found the film obscene and directed the seized print be retained by the government.

In September, 1972, Art Theatre Guild and one of its employees were indicted for violation of 18 U. S. C. 1462.

In September, 1972, the Grand Jury issued various subpoenas to exhibitors and subdistributors throughout the country and the laboratory to produce in Tennessee copies of the film prints and master negative together with business records concerning "School Girl."

B. The civil action to enjoin enforcement of the subpoenas: Court on October 6, 1972, quashes subpoenas to produce prints and negative but adequately protects government.

Plaintiffs in September, 1972, filed a civil complaint and motion for a preliminary injunction seeking *inter alia* declaratory judgment and injunctive relief. That complaint, paragraph 11A, complained specifically about the subpoenas directed to the laboratory (Movie Lab, Inc.) which held the master negative and eight named theatres and a subdistributor located throughout the country and further alleged the subpoenas were violative of the First Amendment.

Defendants objected and claimed the production of the prints and negative was necessary to continue investigation of a nationwide conspiracy to violate 18 U. S. C. 1462.

On October 6 the court quashed the subpoenas and ruled that the "*effect of the subpoenas would be to suppress this film.*"

As the Sixth Circuit stated (App. A, p. 21) the District Court further held:

> "Now, even if a conspiracy exists, this court does not believe that it should be the cause of suppressing the showing of this film."

As the District Court December 1, 1972 opinion states (App. C, p. 33) the District Court on October 6, 1972, fur-

ther directed that the persons and firms subpoenaed should retain the prints and negative "in their actual or constructive possession," not alter or destroy them and keep a record of where the prints were sent for production upon further order of the court (App. C, p. 33). This order, sometimes for convenience referred to as holding "subject to subpoena," amply protected the government.

Assuming the government needed any additional prints for an investigation defendants could have arranged for an orderly and scheduled production of prints. Thus plaintiffs and exhibitors would be free to continue the distribution and exhibition (subject to a minimal interference) instead of the blanket suppression which is a necessary consequence of ten simultaneous subpoenas.

C. The nationwide seizures of prints and negative October 31-November 7, 1972.

Defendants however by multiple search warrants and seizures did exactly what the District Court held they could not do by subpoenas. *Based upon the August, 1972 adversary but preliminary evidentiary probable cause determination by one judge in Tennessee defendants thereupon obtained search warrants in New York (where the master negative was located), New Jersey, Minnesota, and California and seized the master negative and nine (9) to ten (10) prints throughout the country.*

That ended the nationwide distribution and exhibition.

Plaintiffs filed an amended complaint and moved for a preliminary mandatory injunction (i) for a return of the prints and master negative (but to be held subject to subpoena) and (ii) to enjoin future seizures. The District Court by order of December 1, 1972, denied the motion holding plaintiffs had not proved bad faith (App. C, p. 41).

Thereafter in February, 1973, by superseding indictment plaintiffs herein and some 23 other individuals and corporations were indicted for violation of 18 U. S. C. 1462

and 18 U. S. C. 371 for a nationwide conspiracy the alleged unlawful object of which was to exhibit the film throughout the United States. In other words the alleged obscenity of the film in forty-nine states other than Tennessee is being used as the justification for a nationwide seizure and holding of the prints and negative in Tennessee.

The appeal to the Sixth Circuit was perfected and argued November, 1973.

D. The Sixth Circuit order and judgment of September 24, 1974.

The Sixth Circuit agreed with plaintiffs that the action and motion for return must be treated separate and apart from the criminal prosecution and that this action is a separate civil action.

This must be. For in the area of the First Amendment the independent right and remedy of return to vindicate a First Amendment violation is and must be separate from the First and Fourth Amendments' exclusionary rule on the motion to suppress in the criminal case.

The Sixth Circuit held that *Heller v. New York*, 413 U. S. 483 (1973), did not address itself to "a nationwide conspiracy case" and stated that *Hamling v. United States*, U. S. , 41 L. Ed. 2d 590 (1974), "touches on this problem" (App. A, p. 26).

The Sixth Circuit held on the basis thereof that the case should be remanded to permit plaintiffs to make copies of the film prints (App. A, p. 27) *but of course permitted the government to keep the negative and all prints seized.*

We note that the *Hamling* conspiracy count did not allege that the material or brochures involved in *Hamling* were obscene in 50 states and *Hamling did not involve nationwide seizures.*

Basis for Federal Jurisdiction in Court of First Instance and Raising of Federal Questions.

The complaint in the District Court invoked the jurisdiction of the federal court under 28 U. S. C. 1331 and the First and Fourth Amendments, and sought a declaratory judgment and injunctive relief.

First Amendment violations were asserted in the original complaint, in the November, 1972 amended complaint, and the November, 1972 moving papers for a preliminary injunction and on appeal.

The original complaint and amended complaint raised the issue of First Amendment overbreadth of 18 U. S. C. 1462 as applied and impliedly raised the issue of overbreadth of 18 U. S. C. 371.

In view of the Sixth Circuit reliance on *Hamling, supra*, we are now specifically raising the issue of overbreadth of 18 U. S. C. 371 as applied.

REASONS FOR GRANTING THE WRIT.

I.

The Sixth Circuit precedent will permit any United States attorney by preliminary determination of obscenity to halt nationwide distribution and exhibition long before final adjudication. The Sixth Circuit solution of the right to make copies does not and will not cure the prior restraint in this or any similar case and does not comport with *Heller*.

Summary of Point I.

The Sixth Circuit opinion will enable any United States Attorney to use a preliminary probable cause evidentiary

finding of obscenity by a federal judge or magistrate to completely halt the nationwide distribution and exhibition of a film long before any final judgment of obscenity. That is what happened. This is a clear unconstitutional prior restraint (I-A).

The remand solution of the Sixth Circuit (making copies) positively does not and will not cure the First Amendment violation in this or any similar case. It does not comport with Heller and the dangers of this precedent are enormous (I-B).

The government was and is protected by the October 6, 1972 court order, that the master negative and all prints be held "subject to subpoena" particularly where the government already had a copy of the print (I-C).

The Sixth Circuit correctly held this civil action is not a criminal case but is independent thereof (I-D).

I-A

Heller, supra, 413 U. S. at 489, repeatedly cites *United States v. Thirty-Seven Photographs*, 402 U. S. 363 (1971), and *Freedman v. Maryland*, 380 U. S. 51 at 58-59 (1965), and indeed in footnote 5 (413 U. S. at 489, nt. 5) requotes *Freedman* emphasizing that there cannot be any substantial restraint in advance of "a final judicial determination on the merits." *Accd Paris Adult Theatre I v. Slaton*, 413 U. S. 49 at 55 (1973), "no restraint * * * until after a full adversary hearing and a *final* judicial determination." (Italics supplied.)

The adversary hearing concerning "School Girl" was undertaken in August, 1972, on the premise of pre-*Heller* decisions that an adversary hearing was required for an evidentiary seizure of one copy of a film print, e. g., *Astro*

Cinema Corp. v. Mackle, 422 F. 2d 293 (2d Cir. 1970); *Tyrone, Inc., v. Wilkinson*, 410 F. 2d 639 at 641 (4th Cir. 1969); *Demich, Inc., v. Ferdon*, 426 F. 2d 643 (9th Cir. 1970), vacated and remanded *sub nom. Ferdon v. Demich, Inc.*, 401 U. S. 990 (1971), for reconsideration under *Perez v. Ledesma* (citation omitted), i. e., on *Younger* grounds.

The hearing in this case was preliminary and *evidentiary* only, as the lower court and Sixth Circuit both said. It was held under the supposed authority of F. R. Crim. P. 41 (e), where the test is probable cause. See also, *Tyrone, Inc., supra*, 410 F. 2d at 641, adversary hearing not "fully matured action at law"; *Demich, Inc., supra*, 426 F. 2d at 646, can rebut "the showing of probable cause."

The evidentiary hearing and finding of obscenity based thereon was the basis for retaining the first print initially seized. The propriety thereof is not involved in this action.

Motion pictures including sexually oriented films are generally distributed nationwide. It is alleged in the complaint that the picture was exhibited in over 90 cities. There were 22 prints along with the master negative. To seize 9 to 10 additional prints throughout the country constituting roughly 40 to 50 percent of all of the print inventory and the master negative from which all prints are made on the basis of a preliminary evidentiary finding of obscenity is to effect a total and complete unconstitutional prior restraint. It is particularly egregious where the government already had a copy of the film print which had been exhibited in Memphis, Tennessee.

The lower court held on October 6, 1972, that the preliminary "judgment" of obscenity and investigation of a national conspiracy would not justify subpoenas for simultaneous production of the film prints and master negative in Tennessee because it would suppress the film.

Three weeks thereafter the defendants by seizure did exactly what the lower court held they could not do by subpoena. *The distribution and exhibition of "School Girl" was brought to a total and complete halt nationwide.*

This is a clear First Amendment violation.

I-B

The *Heller* solution of making copies where *one print* is seized *but the master negative is not seized* and there is *one* theatre makes sense.

The Sixth Circuit's adaptation of *Heller* (i. e., making copies) *is not justified in this case, does not comport with Heller, will not cure the First Amendment violation and will not work in this or in any similar case.*

The seizure and retention of the master negative and the 9 or 10 prints by defendants was allegedly justified because of the grand jury investigation into a *national* conspiracy.

Let us assume, in accord with the Sixth Circuit mandate, that additional print copies had been made either before or after indictment. Nonetheless all of the subdistributors, the warehouses at which prints are stored and all exhibitors would still be parties to the same alleged national conspiracy. The alleged justification for seizing the prints in the first place would be equally applicable to the seizure of future prints. The right to make copies does not put a halt to multiple seizures. *The Sixth Circuit remand solution of the right to make copies simply validates the massive multiple nationwide seizures of prints and negative and insures it can happen in any case.**

*In this case we note five print copies were seized from one warehouse.

Under those circumstances no exhibitor will book the exhibition of a film, and incur the cost of advertising the film and commence the exhibition thereof, where he knows that FBI agents armed with a search warrant based on the preliminary determination of one federal court can come in and seize the film at any time.

That is exactly why the distribution and exhibition came to a complete halt on or about November 1, 1972, a fact not open to dispute.*

The essence of *Heller* is that an evidentiary seizure of one film print which causes a minimal interference violates no First Amendment rights where there is no showing the seizure prevents "continuing exhibition" and there is only "*a minimal* interference with public circulation pending litigation" (413 U. S. at 492, 493). (Italics supplied.)

The essence of the Sixth Circuit holding applied to this and any national conspiracy case does exactly the opposite. It *validates the seizure of the master negative* and 40 to 50% of the print inventory, *and* an initial *maximum* interference, *and* puts no limitation on continuing future seizures.

In addition, the cost burden and practical difficulties of reproducing prints where the government controls the master negative makes the Sixth Circuit solution unrealistic and unworkable for this reason alone.

Obviously, commercially acceptable release prints (called prints) can be made only from the master negative.

*The indictment in *United States v. Gerber, Sherpix, et al.*, alleges a conspiracy up to November 1, 1972. Obviously, the government knew there could be no alleged conspiracy after that date because no exhibitor would book the film.

Where, as in *Heller*, there is only one print seized the replacement can generally be achieved with minimal problems. Firstly, generally, other prints are available. Secondly, the negative without further checking or processing is readily available for striking a commercially acceptable release print because the negative has not been seized (see *Heller*, 413 U. S. at 493, nt. 10). Thirdly, the cost of making one print, now approximately $720 per print, is not prohibitive.

Assuming *arguendo* in this case the negative has not been irretrievably damaged because of absence of storage in controlled laboratory conditions, we have the following. The laboratory (Movie Lab in New York) *must* first make a check print or answer print to make sure that commercially acceptable release prints can be made at all. That is a cost which varies from $1,800 to $3,000.

The release prints cost $720 per print, 10 prints, $7,200. The basic laboratory production cost is $10,000 aside from the distributor's overhead. Compelling a distributor to incur a direct laboratory cost of $10,000 to continue distribution does not comport with *Heller* and it is *not* a minimal interference.

I-C

While copying in this or similar cases will not satisfy First Amendment requirements (I-B, *supra*) the October 6, 1972, ruling of the lower court amply protected the interests of the government in preserving evidence for investigation or trial.

That October 6, 1972 ruling, set forth in the December 1, 1972 opinion of the District Court (App. C, p. 33), and repeated in essence in the Sixth Circuit opinion (App. A, pp. 21, 22) directed that all persons and corporations subpoenaed hold the material in their actual or constructive possession subject to further production in Tennessee, i. e., the prints and negative were held subject to the

executed subpoena process and the further order of the court.

That ruling protected the government but enabled the plaintiffs to continue distribution.

All that the defendants had to do for their Grand Jury investigation was to make an intelligent scheduling of the production of the film prints in Tennessee even assuming they needed them at all. The corporate exhibitors and subdistributors who were subpoenaed are not going to risk contempt of court and obstruction of justice charges by tampering with the prints. Assuming *arguendo* the defendants were not satisfied with the October 6, 1972, decision they should have appealed instead of taking the law into their own hands.

In any event the October 6, 1972, order of the lower court amply protected the interests of the defendants and the government for investigation and trial.

I-D

The Sixth Circuit correctly held that this civil action was an action independent of the criminal prosecution.

A seizure by law enforcement officials of alleged obscene materials in connection with criminal prosecutions but in violation of First Amendment rights always did, and *Heller* made clear it still does, give rise to two separate and independent rights:

(i) the independent right to mandatory injunctive relief for a return of the material seized for violation of the First Amendment and

(ii) the application of the exclusionary rule in the criminal prosecution for violation of the First and Fourth

Amendments. *Heller, id.* at 493, nt. 11; *Cinema Classics, Ltd., v. Busch*, 339 F. Supp. 43, 48, 50 (C. D. Cal. 1972) (three judge ct.), aff'd *sub nom. Busch v. Cinema Classics, Ltd.*, 409 U. S. 807 (1972), preliminary injunction granted directing the return of material, less a "small amount needed as evidence of possible criminal violation" obviously interrelated matters of First and Fourth Amendment and application of the exclusionary rule left for the criminal prosecution; *American News Company v. Ladas*, 454 F. 2d 1237 at 1240 (6th Cir. 1972), *id.* at 1240, absence of bad faith immaterial on application for mandatory injunctive relief and matters of Fourth Amendment admissibility in evidence of material seized left for criminal prosecution; *Turoff, Inc., supra*, 410 F. 2d at 641, nt. 4, preliminary injunction order affirmed; film print returned but copy to be made available; comment note 4 shows that the First and Fourth Amendment exclusionary rule application left for the criminal prosecution.

Aside from First Amendment cases a separate civil plenary action and proceeding by way of a preliminary injunction is a proper and appropriate action and procedure against officials and offices of the United States to obtain return of property illegally seized by agents of the federal government, or by federal prosecutors, even where the seizure occurs by the federal prosecutor for use in a criminal prosecution. The court may not always grant the relief, but the court has the unquestioned power to rule on the matter independent of the criminal action. *Cogen v. United States*, 278 U. S. 221, 225, 226 (1928); *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 354-355, 358 (1931); *Perlman v. United States*, 247 U. S. 7, 13 (1918); *Rea v. United States*, 350 U. S. 214, 217 (1956); *Dowling v. Collins*, 10 F. 2d 62 (6th Cir. 1926); *Lord v. Kelley*, 223 F. Supp. 684 (D. C. D. Mass. 1963), appeal dismissed on other grounds 334 F. 2d 742 (1st Cir. 1964).

The Sixth Circuit correctly held that this civil action was a separate civil action* independent of the criminal prosecution.

II.

18 U.S.C. 371 is overbroad as applied to justify the seizure of the negative and film prints throughout the country.

The initial indictment of September, 1972, against Art Theatre Guild, Inc., and Tom Berman and the superseding indictment of February, 1973, against Gerber, Sherpix, *et al.*, were both returned when the "national community standards" rule was in effect. The February, 1973, indictment charges in Count I that from August 1, 1971, through November 1, 1972, approximately twenty-five individuals and corporations conspired to knowingly use common carriers to transport "School Girl" in violation of 18 U. S. C. 1462 and that the alleged unlawful ultimate object of the conspiracy was "to profit financially the defendant and others by the public exhibitions of said (allegedly obscene) motion picture film to paying patrons of theaters *throughout the United States*." (Parentheses and italics supplied.)

The plaintiffs claimed from the outset that even a national community standard rule did not justify a preliminary evidentiary determination of obscenity by one federal court in Tennessee being used to authorize the seizure

*An application for certiorari time extension was filed. That application stated specifically that we do not "in any way" concede that this is a criminal case and that "this action is governed by 28 U.S.C. 2101(e)" (typographical error corrected). No time extension is required. This petition is timely filed.

of the master negative and 40 to 50% of print inventory *throughout the county* for the investigation, or trial evidence in Tennessee to prove that the film exhibition was unlawful throughout the country. This would quickly lead to impermissible national censorship by the federal government. In short, 18 U. S. C. 371 as applied to justify seizures is overbroad.

The validity of this argument should not be open to doubt in light of *Miller v. California*, 413 U. S. 15 at 32 (1973); see also, *Jenkins v. Georgia*, U. S. , 41 L. Ed. 2d 642 at 648 (1974). *Hamling v. United States*, U. S. , 41 L. Ed 2d 590, relied on by the Sixth Circuit does not support its position.

Tests (a) and (b) of *Miller* are firstly fact issues to be determined in accordance with what the *local* community tolerates, *Miller*, *id.* at 32, and the understanding of the communities "from which" the jurors come. *Jenkins*, *id.* at 648. Thus, as *Miller* stated in essence (*id.* at 32), changing only the names of the areas, what may not be acceptable in Maine or Tennessee might be perfectly acceptable in New York City or San Francisco.

It is presently a fact that there is not and has not been in San Francisco for over a year and a half any enforcement of the obscenity laws against consenting adults. That is the local community standard.

A statute is overbroad if it sweeps within its reach that which is permitted as well as that which may be proscribed. *Keyishian v. Board of Regents*, 385 U. S. 589 at 609 (1967); *Gooding v. Wilson*, 405 U. S. 518 at 522 (1972).

18 U. S. C. 371 as applied to this case to justify the nationwide seizures is clearly palpably overbroad whether the local standard rule is applied statewide or on a lesser area basis. It is not the business of a federal court or federal grand jury in Tennessee to be investigating or determining whether this or any other film is obscene in California, Pennsylvania (where there is no obscenity law), Illinois, New York City and every state and city in the country. This is a matter of fact and law to be determined by this court and jury in its area. The Tennessee federal court may not constitutionally determine a film shipment from New York to San Francisco (which does not touch Tennessee) is obscene in San Francisco when as a matter of fact and law it is not obscene in San Francisco.

There is no question but that the conspiracy count against the defendant in the criminal case is not limited to shipments into Tennessee or out of Tennessee. The alleged overt acts set forth in Count One of the indictment include shipments by subdistributors which do not touch Tennessee at all and have nothing to do with Tennessee.

The Sixth Circuit relied in part on *Hamling*. But the charging part of the conspiracy count in the *Hamling* indictment (Appendix F) does not charge that the object of the conspiracy was to profit the *Hamling* defendants by sales of any material at retail stores throughout the country.

And *Hamling did not involve nationwide seizures and nationwide seizures were not necessary for the government to prove the case in Hamling.*

The charging part of the conspiracy count in *United States v. Gerber, et al.*, charges as the unlawful object the public exhibition of the film at "*theaters throughout the*

United States." The defendants are not entitled to draft a conspiracy indictment which is an overbroad violation of the First Amendment and then use their own abuse of 18 U. S. C. 371, and the inherent overbreadth of 18 U. S. C. 371 to justify their seizures.

18 U. S. C. 371 and the conspiracy count may not be applied and used to permit Tennessee federal court to consider interstate shipments and exhibitions which have nothing to do with Tennessee. Hence 18 U. S. C. 371 may not be applied and used to permit seizures of the master negative and prints throughout the country.

CONCLUSION.

The writ of certiorari should be granted.

Respectfully submitted,

RALPH J. SCHWARZ, JR.,
22 East 40 Street,
New York, N. Y. 10016
(212) MU-6-8160.

EDMUND C. GRAINGER, JR.,
501 Fifth Avenue,
New York, New York 10017
(212) 697-2710.

FRIERSON M. GRAVES, JR., and
MICHAEL F. PLEASANTS,
2020 First National Bank Building,
Memphis, Tennessee 38103
(901) 525-8231.

Attorneys for Petitioners.

APPENDIX A.

No. 73-1422

UNITED STATES COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.

ART THEATRE GUILD, INC., and SHERPIX, INC.,

Plaintiffs-Appellants,

v.

LARRY E. PARRISH, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed September 24, 1974.

Before: PHILLIPS, HARRY, Chief Judge; PECK, JOHN W., Circuit Judge; *JOINER, CHARLES W., District Judge.

JOINER, District Judge. The plaintiffs-appellants in this case seek reversal of the District Court's Order refusing to order the return of all ten (10) or twelve (12) prints of a motion picture seized pursuant to search warrants from various persons throughout the United States. Defendants contend they have a right to retain the prints as evidence in the prosecution of the plaintiffs-appellants for violation of federal obscenity laws and for conspiracy

*The Honorable Charles W. Joiner, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

to violate them. The case is affirmed but remanded to the District Court to carry out the mandate set forth in this opinion.

Background.

An Order to Show Cause was issued by the District Court in Memphis, Tennessee, ordering the possessors of the motion picture "Schoolgirl" to either bring the film forthwith to the District Court, or, alternatively, to give the film to the United States Marshal for its transportation to the District Court, and to come and show cause, if any, why the film should not be declared obscene. The film was then in the possession of Film Transit, Inc., having completed a playdate of approximately eleven (11) weeks at the Studio Theatre, Memphis, Tennessee, and was in the process of being shipped from Tennessee to New Jersey.

When the film was physically produced in open court counsel, now before this court representing plaintiff Art Theatre Guild, Inc., appeared demanding return of the film but without stating whose interest he represented. The court viewed the film, but on motion of the attorney demanding return of the film, adjourned the adversary hearing in order to allow an opportunity for anyone having an interest in the film to assemble proof on the issue of obscenity. No person subject to an *in personam* order of the court offered to or requested return of the film at that point, and the court kept it in order not to be divested of its power and control over the subject matter or *res* of the controversy.

An evidentiary hearing was held and the court found the film obscene and directed that the seized print be retained by the government.

Thereafter, an indictment was returned against Art Theatre Guild, Inc., and one of its executive officers, charging, in one count, a violation of 18 U.S.C. § 1462 for using

a common carrier to ship the motion picture "Schoolgirl" to Memphis, Tennessee. The grand jury investigation continued, and it concluded the issuance by the grand jury of numerous subpoenas. Among those were subpoenas to various persons and corporate entities requiring them to bring prints and negatives, among other things, to Memphis from various places throughout the nation.

Later, the appellants Art Theatre Guild, Inc., and Sherpix, Inc., filed a complaint against Larry E. Parrish, an Assistant United States Attorney, and Thomas Turley, the United States Attorney, seeking declaratory relief, injunctive relief, and damages. The complaint alleged that after the conclusion of the hearing, at which time the judge ruled the motion picture "Schoolgirl" was obscene as a preliminary matter, Mr. Parrish, the Assistant United States Attorney, caused approximately (30) *subpoena duces tecum* to be issued and served throughout the United States. These subpoenas required the production not only of all business records but the master negative and all prints of the motion picture "Schoolgirl."

The court, within ten (10) days, heard the motion for preliminary injunction and ruled that because the motion for preliminary injunction raised issues that were addressed to the subpoenas that had been issued for the grand jury, the court would consider the motion for preliminary injunction as a motion to quash the subpoenas. It then quashed the subpoenas as to the production of the motion picture prints and said that "The effect of the subpoenas would be to suppress this film." The court further said:

> "Now, even if a conspiracy exists, this court does not believe that it should be the cause of suppressing the showing of this film."

As a condition of the granting of the motion to quash, the court directed that the films not be altered or de-

stroyed and directed that the parties subpoenaed keep a record of the location of all prints and the master negative, and directed that they be held and accounted for subject to the further order of the court.

Subsequent to this ruling, Mr. Parrish, Assistant United States Attorney, in cooperation with Mr. Hester of the Memphis FBI office, and with the cooperation of various FBI agents throughout the country, obtained a number of search warrants. Within the next few days, approximately ten (10) to twelve (12) prints of the motion picture "Schoolgirl," and the master negative of the film, were seized throughout the country. The warrants were issued by United States Magistrates in Newark, New Jersey; Camden, New Jersey; Minneapolis, Minnesota; and Los Angeles, California.

A motion for a preliminary injunction was immediately filed requesting the return of the prints and negatives seized as a result of the search warrants. It also requested an injunction against any further seizures or suppressions of the motion picture by use of search warrants, grand jury subpoenas, or any other method of procedure. Within thirty (30) days, the District Court in a Memorandum Decision and Order denied plaintiffs' motion seeking a return of the seized material. It is an appeal from that order which is before this court.

Two and one half months later, the grand jury returned an indictment which superseded the original indictment returned against Art Theatre Guild, Inc. The subsequent indictment names approximately twenty-five (25) corporate and individual defendants, including both plaintiffs in this case. It again alleges violations of 18 U.S.C. § 1462, but now includes an alleged violation of 18 U.S.C. § 371, charging a conspiracy involving the national distribution of the motion picture "Schoolgirl."

Discussion.

The problems raised in this case bring into conflict competing policies of federal law. On the one hand, the defendants contend they are entitled to keep the evidence they have lawfully acquired in order to prosecute the plaintiffs-appellants for violations of the law. On the other hand, the plaintiffs-appellants contend they are entitled, in the exercise of the rights of free speech and press, to have the motion pictures and masters returned to them. Both the plaintiffs-appellants and the defendants-appellees have seized the policy most favorable to their position, and the plaintiffs-appellants have asked this court to resolve the dispute in their favor by reversing the trial court ruling refusing to return the films. Both policies are entitled to support, and conflict between them in their application is to be avoided if it can be done.

The subsequent indictment involving not only the plaintiffs-appellants but also a number of other persons throughout the United States on questions involving the transportation, shipment and receipt of the motion pictures in interstate commerce and conspiracy involving the same shipments, etc., point up the need to consider the propriety of responding affirmatively, without thought of the possible consequences to that criminal litigation, to the plaintiffs-appellants' demands in a civil action for the return of the films.

The defendants first seek refuge in the policy enunciated in *DiBella v. United States*, 369 U. S. 121 (1961). The defendants view this proceeding as no more than a mere guise for an attempt to suppress evidence to be used in the criminal proceedings brought against these and other defendants in the subsequent indictment. *Cogen v. United States*, 278 U. S. 221 (1929). Review of an order refusing to return property was not permitted in *DiBella* unless the demanded return of the property was

completely independent from any criminal proceedings. The Supreme Court sought to define independent by stating: "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." 369 U. S. at 131-132.

Undoubtedly the present motion is indeed tied to a criminal proceeding now pending in the Western District of Tennessee. *United States of America v. Gerber, et al.*, Criminal No. 73-45. Count one of the indictment in that action alleges a conspiracy, on a nationwide scale, to violate 18 U.S.C. § 1462, all in violation of 18 U.S.C. § 371. The indictment further alleges violations of 18 U.S.C. §§ 2 and 1462.

This is precisely the problem to which *DiBella* addresses itself, to wit, the piecemeal litigation of criminal proceedings. Memories fade, witnesses become unavailable and perishable evidence disappears as the mills of justice slowly grind. These precise evils are what *DiBella* sought to prevent, and were it not for the competing policy urged by the plaintiffs-appellants, and examined below, this appeal would be dismissed forthwith.

The policy of the law on which plaintiffs-appellants rely is stated in *American News Company v. Ladas*, 454 F. 2d 1237 (6th Cir. 1972), when this court affirmed an order returning books seized as a result of a massive seizure that were not essential to the criminal prosecution of obscenity. *Heller v. New York*, 413 U. S. 483 (1973), opted for the freedom to display films there involved on the same theory as did *Ladas* with the books, but permitted the retention by the prosecution of enough copies for evidential purposes.

The narrow issue before the Supreme Court in *Heller* was "whether a judicial officer authorized to issue warrants, who has viewed a film and finds it to be obscene, can issue a constitutionally valid warrant for the film's seizure as evidence in a prosecution against the exhibitor,

without first conducting an adversary hearing on the issue of probable obscenity." 413 U. S. at 484. The narrow holding on that narrow issue was "there is [no] absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. . . . In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution." *Id.* at 488.

Opinions of the Supreme Court, however, are more than narrow issues and narrow holdings. Rather, they are guidelines for lower courts to follow as they preside over the multiplicity of problems which arise in the Nation's diverse state and federal courts. As such the opinions must be looked to in their entirety as the Nation's many judges work to breathe life into law as enunciated by the Nation's highest arbitrator of Constitutional issues.

For guidance in this case, the Court in *Heller* made the following statement:

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the

> court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned." [Footnotes omitted.] *Id.* at 492.

This court must fashion a decision which gives recognition to both *DiBella* and *Heller*. On the one hand this entire matter could simply be remanded with directions to raise in the criminal proceedings the issues fostered by the *Heller* decision. But mitigating against that is the entire thrust of *DiBella*, how best to prevent delay. If the court remanded these issues for them to be raised in the criminal proceedings, the result would be precisely that, delay. The reality of judicial economy and the spirit and intent of *DiBella* dictate that this court resolve the issues in light of the *Heller* decision.

Since *DiBella* predated *Heller*, it obviously could not have given consideration to the dictum found therein. The decision takes no account of the Supreme Court's statement, that one copy of a film is sufficient to preserve the evidence needed in the prosecution of an obscenity offense. *Heller*, however, does not address itself to the problems presented in the prosecution of a nationwide conspiracy case.

The Supreme Court in *Hamling v. United States*, No. 73-507, June 24, 1974, touches on this problem and indicates how a district judge sitting in one district can handle the "contemporary community standard" requirement when faced with a federal prosecution and the need to consider its application in several districts.

In this case the trial judge held an evidential hearing on the preliminary question of obscenity and found the film to be obscene. Based on that finding search warrants were issued and the copies of the film were seized. This is not a case analogous to *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964), or *Marcus v. Search War-*

rant, 367 U. S. 717 (1961). As stated in *Heller*, "the requirements of *A Quantity of Books* and *Marcus* are fully met." *Heller, supra*, 413 U. S. at 491. There was an ". . . independent judicial determination of obscenity by a neutral detached magistrate . . . [and] the seizures [were] made to preserve evidence for a criminal prosecution." *Heller, supra, Id.* at 491, n. 7.

The trial judge found that Sherpix, Inc., a plaintiff-appellant in this case, was the owner of the film and that the adversary hearing on obscenity was binding on it. The court declined to interfere with the efforts of those charged with enforcing the law from obtaining "evidence in furtherance of *bona fide* investigations and prosecutions for violations of the United States laws." The court did not abuse its discretion in refusing to interfere.

On remand, if it appears to the trial court "that other copies of the film are not available to the exhibitor the court should permit the seized film to be copied," *Heller, supra, Id.* at 492, at their own expense. The defendants are, of course, entitled to the safeguards set forth in *Heller* as to the copying of the film which is being preserved as evidence in a criminal proceeding.

This directive preserves the policy of the law permitting the government to gather evidence for use in prosecution of violations of the law, while at the same time permitting the free exercise of the First Amendment rights of the Constitution.

The case is affirmed but remanded to the District Court to supervise the process of permitting, if necessary, the appropriate plaintiff-appellant to make copies of the seized films without destroying the government's right to retain the evidence it deems necessary for its case, and to determine as provided in the trial court memorandum if any material seized "is not relevant and necessary evidence to the prosecution."

So ordered.

APPENDIX B.

UNITED STATES COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.

No. 73-1422

ART THEATRE GUILD, Inc., and SHERPIX, Inc.,

Plaintiffs-Appellants,

v.

LARRY E. PARRISH, *et al.*,

Defendants-Appellees.

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and JOINER, District Judge.

Judgment.

APPEAL from the United States District Court for the Western District of Memphis.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Memphis and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the case is remanded for further proceedings.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s JOHN P. HEHMAN
Clerk

Issued as Mandate:
Costs: None

A True Copy.
Attest:

JOHN P. HEHMAN, Clerk

APPENDIX C.

December 1, 1972 Decision.

IN THE

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION.

ART THEATRE GUILD, Inc., and SHERPIX, Inc.,

Plaintiffs,

vs.

LARRY PARRISH and THOMAS TURLEY,

Defendants.

Civil Action No. C-72-337

Memorandum Decision.

This ruling pertains to an application for a preliminary injunction whereby the plaintiffs seek injunctive relief requiring the defendants to return certain prints and negatives of the motion picture "School Girl" and an order restraining the defendants from attempting to gain possession of other prints of the same movie by subpoenas, search warrants or other process. In the complaint the plaintiff, Art Theatre Guild, Inc. (hereinafter called "Guild") is identified as an Ohio corporation which maintains a booking office in New York, New York and owns and operates approximately forty theatres throughout the United States. The plaintiff Sherpix, Inc. (hereinafter called "Sherpix") is identified as an Ohio cor-

poration which is the owner of all rights to the motion picture "School Girl" and is the distributor of the same. The defendants Parrish and Turley are sued individually and in their capacity as an Assistant U. S. Attorney and the U. S. Attorney, respectively, for the Western District of Tennessee.

In this ruling it is necessary to incorporate a factual account of other proceedings which occurred in the Court of this district pertaining to this film.

On Friday, May 26, 1972, the defendant Parrish filed a proceeding in this Court which was styled *United States of America vs. Two Cartons Containing One Motion Picture Film Entitled "School Girl"*, Civil Action No. 72-179. In that proceeding the United States applied for an order to show cause why the film "School Girl" should not be seized for an investigation and possible prosecution under 18 U.S. Code §1462, which prohibits knowingly transporting in interstate commerce obscene motion picture films. On that *ex parte* application the Court entered a show cause order whereby the Marshal for this District was directed to obtain possession of the film and bring it to this Court sealed at 9:30 A.M. on Monday, May 30, 1972, where those in possession of the film would then and there show cause why the film should not be declared obscene and a warrant executed authorizing the seizure of the film. Copies of the Order to Show Cause were ordered served specifically upon the Manager of the Studio Theatre, 535 South Highland, Memphis, Tennessee, and any other person in whose custody or possession the film was found and the person in charge at Bonded Film Storage Company, Fort Lee, New Jersey.

On May 30, 1972, Michael Pleasants, Esq., an attorney of the Memphis Bar appeared in behalf of the film. The Court indicated that an adversary hearing was being made available with regard to the issue of whether or not the film was obscene. Thereupon the Court adjourned to a screening studio and viewed the film in the pres-

ence of counsel for the United States and Michael Pleasants, Esq. On the application of Michael Pleasants, Esq., the adversary hearing was further adjourned in order for counsel to obtain and present oral testimony pertaining to the issue of obscenity with regard to the film. It should be noted that Michael Pleasants, Esq., from the inception of the case has objected to the procedure whereby possession of the film was obtained and presented to the Court. Exceptions to the Court's overruling of these objections were repeatedly reserved. On further application of Michael Pleasants, Esq., the evidentiary hearing was reset until August 28, 1972, in order to have witnesses for the claimant to the film testify.

On June 7, 1972, the Guild appeared in the cause as a claimant to the film and, therefore, was a participant in the subsequent evidentiary hearing on the issue of obscenity. This hearing commenced on August 28, 1972 and continued for three days. In an oral ruling on August 31, 1972, the Court found the film "School Girl" to be obscene within the meaning of the applicable authorities and authorized the seizure of the film with regard to the investigation of a possible violation of 18 U.S. Code §1462.

An appeal has been taken on the actions of the Court concerning the procedure for obtaining the film and the finding of obscenity with regard to it.

On September 11, 1972, the Grand Jury in this district returned a one count indictment charging the Guild and Arnold Jordan with using on or about March 3, 1972, the Novo Air-Freight Company, a common carrier, for transporting in interstate commerce from New Jersey to Tennessee, one copy of "School Girl", an obscene motion picture film.

On September 28, 1972, the complaint in this cause was filed pursuant to 28 U.S.C. §1331 for the primary purpose of seeking an injunction against the defendants from seeking the production of other copies of the film

"School Girl" through subpoenas issued to certain firms and persons thought to have possession of prints of the film. At that time the subpoenas had been prepared by the defendant Parrish and issued for production of records pertaining to the film "School Girl" and additional prints of the film for presentation to the Grand Jury of this District on October 13, 1972. In addition to the original application for injunctive relief in this cause there were pending in this District motions to quash these subpoenas. On October 6, 1972, this Court conducted a hearing on the motions to quash and the application for injunctive relief. No oral testimony was offered. The Court ruled that the application for injunctive relief would be considered a motion to quash the subpoenas and that pursuant to Rule 17(c) F. R. Crim. P. the Court would quash the subpoenas insofar as it required the production of prints of the film. The Court overruled the motion to quash the production of records pertaining to the film "School Girl" and directed that the persons and firms who were served with subpoenas should retain in their actual or constructive possession any prints, negative or positive of the film and not alter or destroy any copy of the film. Those persons and firms were also directed to keep a complete record of where the film was kept or sent so that the whereabouts of copies of the film could be determined for production of the film upon order of the Court.

On November 1, 1971, Ralph J. Schwartz, Jr., Esq., and Michael Pleasants, Esq., appeared in the chambers of this judge for the purpose of seeking relief with regard to the cessation of search and seizure warrants issued in other districts for the negative of the film in New York and prints in other areas. The defendant Parrish was also present on that occasion, and as a result of a conference the Court directed counsel for the plaintiffs to amend the complaint to reflect what had transpired since the Court's ruling of October 6, 1972, pertaining to Sub-

poena *Duces Tecum* with regard to prints of the film. On November 3, 1972, a supplemental motion for preliminary injunction was filed in the cause. Attached thereto was an affirmation of Ralph J. Schwartz, Jr., accompanied by an unsigned affidavit for a search warrant prepared for presentation to a Magistrate in Los Angeles, California and a search warrant issued pursuant to the affidavit authorizing a seizure of the film at the Cinema Theatre in Los Angeles, California; and a search warrant issued by a Magistrate in the Southern District of New York authorizing the seizure by the FBI of the negative of the film "School Girl" from the executive offices of Movie Labs, Inc. in New York City. The affidavit pertaining to the Cinema Theatre indicated that this Court had adjudicated the movie "School Girl" as obscene, that documentary evidence submitted under oath to the Grand Jury in this District established that there existed twenty positive prints and a negative of the film distributed nationwide by Sherpix and that an indictment had been returned against the Guild and Arnold Lawrence Jordan charging a violation of 18 U.S.C. §1462. The search warrant issued pursuant thereto recites that the film entitled "School Girl" was evidence of a conspiracy to violate Title 18, U.S.C. §1462 and §1465. There was attached to the affidavit the application for a show cause presented to this Court with the accompanying affidavit of Joe C. Hoester, Special Agent of the FBI, and a copy of this Court's Judgment on the issue of obscenity with regard to the film "School Girl".

The return of the warrant authorizing the search and seizure from Movie Labs, Inc., indicates that the negatives of the film entitled "School Girl" from which all prints are made, were seized. Also certain records were seized. The affirmation of Ralph J. Schwartz, Jr., reflects that a print of the film was seized from Cinema Theatre in Los Angeles, California and that seizures were made at Bonded Film Storage Company, Fort Lee, New Jersey

and Independent Film Service in Minneapolis, Minnesota. At the hearing on the present motion the defendant Parrish stated that there is thought to be twenty-two prints of the film and that ten or twelve of the prints had been seized. Apparently more than one copy of the prints were seized at some of the locations.

On November 10, 1972, the defendant Parrish filed a thirty-three page Memorandum of Points and Authorities in opposition to plaintiff's Motion for Preliminary Injunction. On November 14, 1972, Michael Pleasants, Esq., filed a brief in furtherance of the motion for a preliminary injunction which was styled "An Overview". On November 22, 1972, plaintiffs filed a reply memorandum in support of motion for a mandatory injunction for return of property illegally seized. On November 24, 1972, the date the Court had set for a hearing at 2:00 P.M. on the Motion for Preliminary Injunction, Michael Pleasants, Esq., at 11:15 A.M. filed an Amended and Supplemental Complaint seeking to add as defendants Patrick Gray, Director of the FBI and two Special Agents in the Memphis Office of the FBI. At 1:45 P.M. a Motion to Dismiss or in the Alternative for Summary Judgment was filed in behalf of defendants Turley and Parrish by J. N. Raines, another Assistant U. S. Attorney for this district. That motion asserts that no relief should be granted in this case because the defendants acted within the scope of their official positions and were therefore authorized to do so by law. The defendants also moved that the Court stay the application for a preliminary injunction pending a determination of the Motion to Dismiss. The Court overruled the Motion to Stay the Hearing and indicated that the affidavits in support thereof would be considered on the issues pertaining to the Motion for Preliminary Injunction previously filed and set for hearing on that date in this Court. No oral proof was offered at the hearing therefore this ruling is based upon the record in the cause and relevant portions of the record in the other cases pending in this district.

In furtherance of the application for the preliminary injunction and by way of response to the reply of the defendants the plaintiffs assert three primary contentions. First, the plaintiffs assert that the defendants violated this Court's October 6, 1972, ruling by procuring the seizure of the films by warrant after the Court quashed the production of copies of the film by subpoena to the Grand Jury. Secondly, plaintiffs contend that the action of the defendants is a suppression by massive seizure which is prohibited when first amendment rights are in issue. This contention raises the question of the necessity for a separate adversary proceeding and ruling on the issue of obscenity when seizure of the prints of the film is sought before judicial officers in other districts. Third, the procedure of a separate plenary action against the defendants authorizes this Court to grant the relief sought.

Separate pre-indictment actions may be brought in District Court against federal officials for injunctive relief and return of illegally seized property, pursuant to 28 U.S.C. §1331 and Rule 41(e) F. R. Crim. P. The jurisdiction in Rule 41(e) suits rests upon the courts supervisory power over the actions of law enforcement officials, but the jurisdiction is to be exercised with great restraint and caution. *Fifth Avenue Peace Parade v. Hoover*, 327 F. Supp. 238 (S.D.N.Y., 1971).

Because all of the issues in this case pertain to possible criminal prosecutions under the laws of the United States, more particularly 18 U.S.C. §1462 and §1465 and 18 U.S.C. §371 (the conspiracy section), the applicability of the Federal Rules of Criminal Procedure must be considered. At all times since the issuance of the warrants complained of herein, Rule 41(e) of F. R. Crim. P., as amended October 1, 1972, provided as follows:

> (e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may

> move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Rule 41(e) contemplates a separate plenary action for a return of property when the issues complained of do not address themselves to a pending criminal procedure. Sherpix is not a defendant in any criminal proceeding in this district, therefore, under the existing rule it would be subject to the portion of the rule pertaining to a person aggrieved by an unlawful search and seizure which was allegedly illegally seized in other districts. Rule 41(e) contemplates a hearing on any issue of fact necessary to the decision of the motion. In the opinion of this Court this would include proof which could form the basis for a finding whether or not the Guild and Sherpix are so closely identified that the prior determination of obscenity was binding upon Sherpix and if not whether or not a separate adversary hearing is required with regard to the copies of the film allegedly seized in another district. Similarly, one of the issues would be a determination of whether or not the copy of the film in question was evidence of the commission of a crime under the laws of the United States including a conspiracy prosecution or otherwise meets the criteria for property which may be seized as set forth in Rule 41(b) F. R. Crim. P.

With regard to that portion of the rule which pertains to a motion for return of property which is made or comes on for hearing in the district of trial after an indictment is filed this Court concludes, first, that there has been no indictment filed which would make copies of the film from other districts relevant to the pending proceedings. In this regard the Guild has been indicted only with regard to the alleged transportation of the one copy of the film which is presently under a seizure warrant after an adversary proceeding. Therefore, the Court concludes that the issues presently before the court pertaining to seizures in other districts do not address themselves to a motion contemplated by the last sentence of Rule 41 (e).

As previously indicated the plaintiffs seek injunctive relief upon a contention that the request for procurement for search warrants of other copies of the film in other districts by the defendant Parrish constitutes a violation of this Court's ruling of October 6, 1972, wherein the Court quashed the production of copies of the film by subpoena *duces tecum*. This contention addresses itself to the motives and purpose of the defendants in seeking possession of the prints of the film. In this regard plaintiffs assert that the motive and purpose of the defendants is to deprive the plaintiffs of the use of the film and thereby violate their First Amendment rights while the controverted issue of whether or not "School Girl" is obscene as found by this Court is reviewed. This addresses itself to the principle of law referred to in *American News Company vs. Ladas*, 454 F. 2d 1237 (C. A. 6 1972) wherein the Court noted that the District Judge made no finding on the issue of bad faith or harassment.

The defendants contend that the efforts of the defendant Parrish with regard to possession of the film have been in furtherance of their official responsibilities as U. S. Attorney and Assistant U. S. Attorney for the Western District of Tennessee. With regard to the possession of

the prints of the film in other districts the defendant Parrish admits that he was a participant in the procurement of the search warrants and further contends that the procedures followed were valid means of obtaining evidence in connection with prosecutions in this district.

In order to set forth the present ruling of the Court, it is necessary for this Court to explain its reasoning with regard to past rulings. It should be noted that the original application for a show cause order to obtain possession of the film "School Girl" in this Court was based upon the contention by the Government that those interested in the film were entitled to an adversary hearing before the film could be seized for use as evidence in an investigation and prosecution. This Court agreed with the principle that persons interested in the film were entitled to an adversary hearing before the film was released to the FBI, U. S. Attorney and the Grand Jury for appropriate use in the consideration of a probably criminal violation, and a full adversary hearing was granted. Subsequent thereto an indictment was returned with regard to the single copy seized pursuant to the adversary proceeding.

At the time that this Court considered the procurement of other copies of the film by subpoena *duces tecum* returnable to the Grand Jury at the request of the U. S. Attorney's office, this Court could not find sufficient grounds to authorize the production of the film at that stage of the investigation and, therefore, this Court quashed the subpoenas to that extent. The Court did authorize and require the production of records which might be considered by the Grand Jury in furtherance of an alleged conspiracy with regard to the transportation in interstate commerce of the movie "School Girl". The Court's reasoning was based in part upon the fact that prints of these movies were sought from persons and firms who had not participated in the adversary hearing with regard to the single copy of the film. In

this regard the Court was concerned because of the possibility that numerous copies of the film would be taken out of circulation while a review was being sought of this Court's ruling with regard to the procedure for seizing the film and a finding of obscenity. The Court was not unmindful of the many different rulings in the various districts and circuits with regard to the conflict between First Amendment and Fourth Amendment rights.

With regard to the present changed circumstances the Court notes certain principles of law. A massive seizure of all copies of certain books in the possession of one firm without a prior adversary hearing was held to be constitutionally deficient in *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964). That case has been construed to require an adversary hearing prior to the seizure of a single movie. *Bethview Amusement Corporation v. Cahn*, 416 F. 2d 410 (C. A. 2 1969); *Mod Amusement Company v. Murphy*, 335 F. Supp. 1267 (S.D.N.Y. 1972).

In *Bethview* the defendant District Attorney contended that a print of the motion picture was needed for purposes of prosecution. The Court noted that this could be handled prior to the adversary hearing in a number of ways without the seizure of the film, such as directing that a print be made available to the prosecution or the issuance of a subpoena *duces tecum*. The Court further noted that removal of the film for alteration of the offending portions could be controlled by an *ex parte* restraining order. Similarly in *American News Co. v. Ladas, Supra*, at Page 1240, the Sixth Circuit noted that a District Judge might preserve for prosecution allegedly offending materials without a prior adversary hearing by ordering that the possessor make available to the prosecution a single copy of each of the materials.

By its earlier ruling on the issue of obscenity with regard to the movie "School Girl", this Court did not intend to deprive persons in possession of the film who were

not parties to the suit in this Court wherein that issue was considered, of being heard in an adversary proceeding. On the other hand, insofar as the relevancy of the movie "School Girl" to proceedings in this Court can be established with regard to other copies of the film, the Guild has had an adversary hearing which is binding on it. There is insufficient proof in the record in this cause to show a sufficient connection between the Guild and Sherpix to make the former adversary hearing binding upon Sherpix. However, the Court notes that Sherpix was the owner of the copy of the film which this Court authorized seized presumably in the same fashion that Sherpix owns all other copies of the film. The Court also notes that the Court ordered that personal service be had upon Bonded Film Storage Company, Fort Lee, New Jersey, that a show cause hearing on the issue of obscenity had been ordered for May 30, 1972. (Order to Show Cause in case No. C-72-179 issued by this Court May 26, 1972).

With regard to the right to the return of property allegedly illegally seized pursuant to a warrant the burden of proof is upon the person seeking the return of the property. Because the plaintiffs have not carried the burden of proof with regard to any issue of harassment or bad faith on the part of the defendants the Court concludes that no preliminary injunction should issue. In this regard the Court notes that a blanket restraint on the U. S. Attorney against attempts to obtain evidence in furtherance of bona fide investigations and prosecutions for violations of the United States laws would be equally as repugnant as authorizing a massive seizure without a prior adversary hearing. The Court expects the office of the U. S. Attorney and the Grand Jury not to abuse their powers by obtaining possession of controverted obscene films for the purpose of depriving the public of seeing the films and thereby effectively

becoming a national censor. The laws of the United States in question prohibit the interstate transportation of obscene films and all investigations and prosecutions in furtherance thereof should be limited to the issues pertaining to violations of the United States laws. Any material which is not relevant and necessary evidence to the prosecution must not be seized or should be returned promptly if found to be unnecessary after a good faith seizure.

In summary the Court concludes that the application for a preliminary injunction should be denied. The cause will be retained for further proceeding including a hearing on the Motion to Dismiss or Motion for Summary Judgment after responses are made.

(Illegible.)
United States District Court

APPENDIX D.

United States Constitution and Statutes Involved.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Due Process Clause of the Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law.

UNITED STATES CODE:

Title 18, Section 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

TITLE 18, SECTION 1462

§ 1462. Importation or transportation of obscene matters.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

APPENDIX E.

Charging Part of Count One of Indictment in *United States v. Gerber, Sherpix, et al.*, Cr. No. 73-45.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION.

UNITED STATES OF AMERICA

v.

PAUL DAVID GERBER, *et al.*

Cr. No. 73-45

18 USC, §1462

18 USC, §2

18 USC, §371

Indictment.

THE GRAND JURY CHARGES:

COUNT ONE

From on or about some point in time shortly prior to the 1st day of August 1971 up to and including the 1st

day of November 1972 in the Western District of Tennessee and divers other places.

Paul David Gerber
a/k/a David Reberg
Richard Lewis Miller
a/k/a R. L. Mills
Louis K. Sher
Arnold Jordan
Tom Berman
Sherpix, Inc.
Art Theater Guild, Inc.
Ellis Gordon
Marvin Friedlander
Marvin Films, Inc.
Gordon Craddock
Gordon Craddock Films, Inc.
Martin Zide
Allied Film Exchange, Inc.
Jerome Sandy
American International Pictures
Exchange of Washington, D. C., Inc.
Abbott Martin Swartz
Independent Film Distributors, Inc.
Emanuel Youngerman
M. Y. Film Co., Inc.
John O. Glaus
John O. Glaus Agency
Lou Wolfe
Harry Brandt Booking Office, Inc.
and
Bernard Levy

hereinafter referred to as defendants, and Saul Shiffrin, Bonded Film Services, Inc. and Movielab, Inc., and others whose names to the Grand Jury are unknown, named herein as co-conspirators but not as defendants, unlawfully combined, conspired, confederated, agreed and

planned to engage in conduct against the United States by knowingly using express companies and other common carriers for carriage in interstate and foreign commerce and knowingly taking from such express companies and other common carriers an obscene, lewd, lascivious and filthy motion picture film entitled "School Girl" (hereinafter referred to merely as "School Girl"), which said planned acts were then prohibited by Title 18, United States Code, §1462.

The ultimate object of said combination, conspiracy, confederation, agreement and plan was to profit financially the defendants and others by the public exhibition of said motion picture film to paying patrons of theaters throughout the United States. Other objects of said combination, conspiracy, confederation, agreement and plan, designed primarily to attain and enhance the ultimate objective, included obtaining wide notoriety and acclaim for said motion picture film and making all necessary business arrangements to physically place a copy or print of said motion picture film in the possession of theaters for exhibition to the public. Further, the defendants and co-conspirators not named as defendants at various times shipped by use of common carriers prints of "School Girl" to, by, between and among themselves as well as other persons and business entities, and received from common carriers prints of "School Girl" as shipped.

APPENDIX F.

Charging Part of Count One of the Indictment in *United States v. Hamling*.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF CALIFORNIA,

November 1969 Grand Jury.

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM L. HAMLING, *et al.*

No. 10791

The Grand Jury charges that:

COUNT 1

(Title 18, U.S.C., Section 371)

From on or about September 11, 1969, and continuously thereafter up to and including the date of the filing of this indictment, defendants William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Greenleaf Classics, Inc., a California corporation formerly known as Phenix Publishers, Ltd., Reed Enterprises, Inc., a California corporation formerly known as Reed Enterprises, and Library Service, Inc., a Nevada corporation also known as Library Services, Inc., and formerly known

as Reed Enterprises, Inc., did in the Southern District of California and elsewhere willfully and knowingly conspire, combine, collaborate and agree together and with each other and with London Press, Inc., North Hollywood, California, Robert Reitman, Paul Wisner and Bernard Lieberman, doing business as Regent House, North Hollywood, California, and Richard Harte and Venita Harte, doing business as Academy Addressing & Mailing Service, North Hollywood, California, named herein as unindicted co-conspirators, and with diverse other persons whose names are to the Grand Jury unknown, to violate certain laws of the United States, to wit, Section 1461, Title 18, United States Code, all in violation of Section 371, Title 18, United States Code.

It was a part of the said conspiracy that the defendants would knowingly use the United States mails for the mailing and carriage in the mails, and knowingly cause to be delivered by mail, certain non-mailable matter, to wit, obscene advertisements, obscene books, and advertisements giving information as to where, how, from whom, and by what means said obscene books might be obtained.

LIBRARY
SUPREME COURT, U. S.
JAN 15 1975
MICHAEL RODAK JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-749

ART THEATRE GUILD, INC., and SHERPIX, INC.,
Petitioners,

vs.

LARRY E. PARRISH, THOMAS F. TURLEY, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENT LARRY E. PARRISH IN OPPOSITION

LARRY E. PARRISH
Respondent, Pro Se
178 North Yates Road
Memphis, Tennessee 38117

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX TO BRIEF OF RESPONDENT LARRY E. PARRISH IN OPPOSITION

Opinions Below 1

Jurisdiction 3

Questions Presented for Review 3

Constitutional Provisions and Statutes Involved 4

Counter-Statement of the Case 4

Argument 12

Question No. I 12

Question No. II 15

Question No. III 16

Question No. IV 21

Conclusion 45

Appendix AA 49

Table of Cases

A Quantity of Books v. *Kansas*, 378 U.S. 205 (1964) 47

Art Theatre Guild, Inc. v. *Parrish*, 503 F.2d 133 (6th Cir., 1974) 1

Barr v. *Matteo*, 360 U.S. 564 (1959) 14

Bivens v. *Six Unknown Agents*, 403 U.S. 388 (1971) 14

DiBella v. *United States*, 369 U.S. 121 (1962) 3, 15, 16, 19, 46

Fifth Avenue Peace Parade v. *Hoover*, 327 F.Supp. 238, 240 (S.D.N.Y., 1971) 14

G. I. Distributors, Inc. v. *Murphy*, 469 F.2d 752 (2nd Cir., 1972) 19

G. I. Distributors, Inc. v. *Murphy*, 490 F.2d 1167 (2nd Cir., 1973) 19, 47
G. I. Distributors, Inc. v. *Murphy*, 413 U.S. 913 (1973) 20
G. I. Distributors, Inc. v. *Murphy*, 416 U.S. 939 (1974) 20, 47
Griswold v. *Connecticut*, 381 U.S. 478, 482 (1965) 27
Hamling v. *United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974) 23, 30, 31, 39, 40, 41, 42, 45
Hawaii v. *Gordon*, 373 U.S. 57, 58 (1963) 12
Heller v. *New York*, 413 U.S. 483 (1973) 16, 18, 20, 46, 47
Jenkins v. *Georgia*, ... U.S. ....., 41 L.Ed.2d 642 (1974) 31, 42
Kline v. *Burke Construction Company*, 260 U.S. 226, 234 (1922) 14
Larson v. *Domestic and Foreign Corp.*, 337 U.S. 682, 687 (1949) 12
Marcus v. *Search Warrant*, 367 U.S. 717 (1961) 47
Miller v. *California*, 413 U.S. 15 (1973) 24, 29, 37
Paris Adult Theatre I v. *Slaton*, 413 U.S. 49 (1973 ..... 24, 25, 26, 27, 28, 34
Smith v. *United States*, ... F.2d ....., CCA #73-2062 (6th Cir., Nov. 13, 1974) 48
United States v. *Carter*, ... F.2d ....., CCA #74-1150 (6th Cir., Nov. 21, 1974) 48
United States v. *Nasse*, 432 F.2d 1293 (7th Cir., 1970) 43
United States v. *Orito*, 413 U.S. 139 (1973) 26, 27, 28, 34, 35
United States v. *Peachtree National Distributors*, 456 F.2d 442 (5th Cir., 1972) 15-16, 46
United States v. *12-200 Foot Reels*, 413 U.S. 123 (1973) 25, 27, 28, 29, 32, 35
United States v. *Two Cartons Containing One Motion Picture Film Entitled "School Girl"*, CCA #72-1972 (6th Cir., May 10, 1973) 6

Constitutional Provisions Cited

United States Constitution:
First Amendment 4, 16, 18, 19, 34, 40
Art. I, §8, Cl. 3, Commerce Clause 4, 26, 34

U. S. Statutes Cited

18 U.S.C. §2 11
18 U.S.C. §371 ..... 3, 4, 11, 21
18 U.S.C. §1461 23
18 U.S.C. §1462 ..... 3, 4, 6, 11
19 U.S.C. §1305(a) 32
28 U.S.C. §1331 ..... 4, 12, 13
42 U.S.C. §1983 20

Other

Federal Rules of Criminal Procedure, Rule 41 13
Sixth Circuit Review, December 2, 1974, Vol. 3, No. 20, pp. 5-6 48

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-749

ART THEATRE GUILD, INC., and SHERPIX, INC.,
Petitioners,

vs.

LARRY E. PARRISH, THOMAS F. TURLEY, JR., ET AL.,
Respondents.

BRIEF OF RESPONDENT LARRY E. PARRISH IN OPPOSITION

OPINIONS BELOW

On September 24, 1974, United States Court of Appeals for the Sixth Circuit rendered an opinion in the case of *Art Theatre Guild, Inc., and Sherpix, Inc.*, v. *Larry E. Parrish, et al.*, 503 F.2d 133 (6th Cir., 1974). The action taken by the Court of Appeals below appears as follows at 503 F.2d p. 137: (See also Petition Appendix A, p. 27)

> "The case is affirmed but remanded to the District Court to supervise the process of permitting, if necessary, the appropriate plaintiff-appellant to make copies of the seized films without destroying the government's right to retain the evidence it deems necessary for its case, and to determine as provided in the trial court memorandum if any material seized 'is not relevant and necessary evidence to the prosecution.' "

The entire decision of the Court of Appeals below appears as Appendix A in the Petition pp. 19-27.

The Memorandum Decision of the United States District Court for the Western District of Tennessee appears in its entirety as Appendix C in the Petition pp. 30-42. This decision was rendered after the filing of a Complaint by Petitioners naming Respondent, among others, as an individual and in his capacity as Assistant United States Attorney. The United States is not named as a party-defendant. The Complaint filed seeks money damages from the Respondent alleging illegal and unconstitutional exercise of the powers of his office with the intent of effecting nationwide censorship of a motion picture entitled "School Girl", hereinafter referred to as "School Girl". In addition, Petitioners sought injunctive relief requiring the return by Respondent of several copies of "School Girl" and the master negative of that film which had been seized by execution of search warrants at various locations throughout the United States. Additionally, Petitioners sought to obtain injunctive relief against Respondent to prohibit any future actions the designed results of which would be additional seizures of "School Girl".

The district court conducted a hearing concerning the injunctive relief sought by Petitioners and rendered the Memorandum Decision, appearing as Appendix C in the Petition, and concluded as follows:

> "In summary the Court concludes that the application for a preliminary injunction should be denied. The cause will be retained for further proceeding including a hearing on the Motion to Dismiss or Motion for Summary Judgment after responses are made."

It is from these rulings below that Petitioners seek review and reversal of the decisions below rendered.

JURISDICTION

Respondent does not question the subject matter jurisdiction set forth in the Petition but challenges the appealability of the decision of the district court in that it is an interlocutory appeal of a criminal case *in esse*, and governed by *DiBella* v. *United States*, 369 U.S. 121 (1962).

QUESTIONS PRESENTED FOR REVIEW

Petitioners set forth no question which in fact is raised by the proceeding below. The real questions presented are as follows:

1. Did the prayer for money damages from Respondent in Petitioners' Complaint invest the district court with any power or authority?

2. Does *DiBella* v. *United States*, supra, prohibit an appeal from the decision of a district court denying return to persons who are defendants in a pending criminal case of items which are evidence in that criminal case?

3. Is material adjudicated obscene by a district court, after a full adversary hearing on the issue, subject to any protection under the First Amendment?

4. Does the Constitution prohibit or restrict prosecutions for violation of Title 18, United States Code, §371 for conspiring to distribute obscene materials in interstate commerce "throughout the United States" in violation of Title 18, United States Code, §1462?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, First Amendment;
2. Constitution of the United States, Article I, §8, Cl. 3, the Commerce Clause;
3. Title 18, United States Code, §371;
4. Title 18, United States Code, §1462;
5. Title 28, United States Code, §1331.

COUNTER-STATEMENT OF THE CASE

On May 26, 1972 the district court entered an Ex Parte Order To Show Cause which ordered the possessors of "School Girl" to bring the film at 9:30 a.m. on May 30, 1972 to the district court and to come at that time and show cause, if any there be, why the film should not be adjudged obscene and a search warrant issue for its seizure. The film was then in the possession of Film Transit, Inc., in the process of being shipped from Memphis to New Jersey. In addition to the possessors, notice was given by personal service of the Order To Show Cause on persons in charge of the theater in Memphis where the film had just completed an eleven-week playdate and on persons in New Jersey in charge of the addressee company where the film was destined for shipment.

In the Memorandum Decision entered December 1, 1972, included in its entirety as Appendix C of the Petition, the district court attempts to summarize all of the

proceedings prior to December 1972. As seen on p. 31 of the Petition the district court observes:

> "On that ex parte application the Court entered a show cause order whereby the Marshal . . . was directed to obtain possession of the film and bring it to this Court. . . ."

This is an inadvertent factual misstatement. Reference to the Order itself, which is included as Appendix AA to this Brief, shows that the only thing that the Marshal is ordered to do is effect personal service, as above specified, and to seal the film. Further, reference to the court reporter's recordation of the proceedings on May 30, 1972 reveals that the possessors of the film actually produced it in district court in its sealed condition. This further is reflected by the Order of Custody entered by the district court on June 2, 1972 which states that the film was produced "in accordance with this court's Order."

Mr. Simpson from Film Transit, Inc., on May 30, 1972, physically transported and produced the film in the district court. At its production in open court Michael Pleasants, Esq., now representing Petitioners in the instant proceedings, appeared in court and demanded return of the film but refused to answer when asked by the district court whose interest he represented. The district court, then and there, viewed the film and on motion of Mr. Pleasants withheld an adjudication as to its obscenity in order to allow an opportunity for anyone having interest in the film to assemble proof on the issue and present it to the district court. Though Mr. Pleasants was present, upon inquiry by the district court as to whether any person would subject themselves to the in personam jurisdiction of the district court in handling the film, no one agreed and the district court, having no alternative, retained possession of the film to prevent anyone from divesting the

district court of control over the res of the controversy. The United States Marshal was instructed to hold the film for and at the direction of the district court.

On application of Petitioner, Art Theatre Guild, Inc., the continuation of the adversary proceeding concerning the film was continued by the district court on two separate occasions. Prior to the recommencement of the adversary hearing, motions were made to dismiss the action and return the property. Simultaneously a Grand Jury investigation was commenced which was nationwide in scope and included substantial testimonial evidence as well as the production of documents.

Finally, on August 28, 1972, the adversary hearing was reconvened and consumed three days of testimony from five "expert" witnesses testifying at the behest of Petitioner, Art Theatre Guild, Inc., and two psychiatrists testifying at the behest of the United States. At the conclusion of this adversary hearing, on August 31, 1972, the district court orally found the film obscene and entered a written Judgment On Obscenity on September 15, 1972. The denial of Petitioner's motion for return of property and the district court's Judgment On Obscenity were the subject of appeal to the Court of Appeals and in *United States* v. *Two Cartons Containing One Motion Picture Film Entitled "School Girl"*, CCA No. 72-1972 (6th Cir., May 10, 1973) the Court of Appeals entered an order dismissing the appeal as an attempt to perfect an interlocutory appeal in a criminal matter.

On September 11, 1972, the federal Grand Jury in Memphis returned a one-count indictment naming as defendants, Art Theatre Guild, Inc., Petitioner here, and one of its employees, charging a violation of Title 18, United States Code, §1462, relating to the shipment of the film to Memphis. However, the Grand Jury investigation con-

tinued, including the issuance of numerous subpoenas. Among those were several subpoenas to various persons and corporate entities requiring them to bring prints and negatives of "School Girl", among other things, from various places throughout the nation. Before the return date on those Grand Jury subpoenas, on September 28, 1972, Petitioners filed as a "civil" action a Motion For Preliminary Injunction in an effort to enjoin enforcement of those subpoenas. Petitioners claimed their standing by the assertion that they owned all of the prints and negatives. The district court treated this Motion For Preliminary Injunction as a Motion to Quash Subpoenas and conducted a hearing on October 6, 1972. This motion was stringently opposed by the United States, but the district court quashed, at that time, the relevant parts of the subpoenas. The district court attempted to ameliorate the consequences of its ruling by inclusion of restrictions on record keeping in connection with the various prints of the film. The district court in its Memorandum Decision of December 1, 1972 attempted to explain the import of those restrictions as follows and found in the Petition, Appendix C, p. 33:

> ". . . and directed that the persons and firms who were served with subpoenas should retain in their actual or constructive possession any prints, negative or positive . . . and not alter or destroy any copy of the film. Those persons and firms were also directed to keep a complete record of where the film was kept or sent so that the whereabouts of copies of the film could be determined for production of the film upon order of the Court."

The United States contended that these restrictions were unenforceable, unworkable and afforded absolutely no protection for the preservation of extremely important evidence of the crime under investigation. In the first

place the subpoenaed persons were not even parties to the proceeding. The Petitioners there claimed their standing to object on the basis of their ownership of the film. They had not been served with subpoenas. Thus, it is difficult to conceive how anything done by the district court under those circumstances could bind or require action by those directed to act. In the second place, even if those persons were bound, the restriction only requires that they keep records concerning where "they" send the film. Thus, "they" could send the film to their wife who would not be required, under any stretch of the imagination, to keep any record of anything nor would any subsequent possessor. Thus, the chain of possession is lost. Finally, what the district court did was to order persons to prospectively keep and produce, "on order of the court", records the sole purpose of which are to provide incriminating evidence against them. None of these observations take into account the opportunity of loss, theft, deterioration by normal wear and a host of other "innocent" reasons which might account for the evidence no longer being available. The more numerous such "innocent" reasons the more difficult to detect a foul reason. The restrictions envisioned do not take into account the evidentiary value of the films being seized or found in the precise location where they were in that exact condition in relation to the condition of the containers in which they are found, i.e., the containers normally have some evidence on them of all prior shipments. Further the restrictions lose sight of how those particular films in their separate and precise location in their then existing condition relates to other records independently kept, which were obtained during the investigation. It must be kept in mind that the crime in question is not a simple substantive case based primarily on direct evidence, instead, it is a conspiracy case and, as every conspiracy is, is based in large part on circumstan-

tial proof where each separate fact, and its unique relation to every other, is so vitally important. In the Memorandum Decision of the district court, it attempted to explain why it quashed the subpoenas. This explanation can be found in the Petition, Appendix C, p. 39. There the district court explained that "at the time" and "at that stage of the investigation" it was unable to perceive sufficient grounds to authorize the production of the film. By the district court's subsequent action in denying the return of the copies seized, it is implicit that the district court's initial impression subsequently was changed.

Prior to the hearing on October 6, 1972, in which the district court quashed the subpoenas, one subpoenaed party had already turned over one print of the film in New York to the FBI as a means of being excused from production of the print in Memphis. After the hearing on October 6, 1972, United States Magistrates in New Jersey, Minnesota, California and New York issued search warrants in their separate jurisdictions authorizing the seizure of prints and negatives of the film located there. As a part of the probable cause presented to those Magistrates, there was attached to the Affidavit For Search Warrant a certified copy of the Judgment On Obscenity entered September 15, 1972 by the district court. These search warrants were executed resulting in the seizure of nine (9) positive prints and two (2) negative prints. This makes a total of ten (10) positive and two (2) negative prints obtained by the United States and held as evidence in a pending criminal prosecution and Grand Jury investigation. Additionally, after entry of the Judgment On Obscenity, a seizure warrant was issued by the district court which was executed by the FBI, thereby, taking that positive print out of the bosom of the district court and lodging it with the United States for use as evidence.

On November 1, 1972 Petitioners here appeared in district court complaining that the seizures by search warrant violated the district court order orally rendered after the October 6, 1972 hearing on motion to quash subpoenas. They were instructed to amend their motion for preliminary injunction filed by Complaint on September 28, 1972 to reflect all events which had occurred subsequent to the filing. This Petitioners did on November 3, 1972. The district court set a hearing on the motion for preliminary injunction filed September 28, 1972, and amended November 3, 1972, for hearing at 2:00 p.m. on November 24, 1972.

On the day set for the hearing, November 24, 1972, but prior to 2:00 p.m., Petitioners amended the Complaint, which they had previously filed on September 28, 1972, by increasing the number of parties to include FBI officials, increasing the *ad damnum* sought and expanding the allegations on which liability is claimed to exist against Respondent and requesting the injunctive relief, including return of the seized prints, above discussed. On November 24, 1972 the district court conducted the scheduled hearing on the applications for injunctive relief filed prior to November 24, 1972, but for all intents and purposes, in that respect, the relief sought was always the same, i.e., return of the seized prints and an effectual holding that Petitioners could continue the distribution and exhibition of the film without fear of sanction or future seizure during the pendency of the criminal case. It is the denial of this relief which Petitioners seek reviewed.

On February 15, 1973, the Grand Jury returned its last indictment pertaining to offenses connected with "School Girl". See Petition, Appendix E, pp. 45-46 for a part of the indictment. The indictment names 25 individual and corporate defendants charged to be producers,

directors, distributors and sub-distributors throughout the United States, none of wh a reside or are located in the Western District of Tennessee. That indictment includes five substantive counts charging violations of Title 18, United State Code, §1462 and §2 and one conspiracy count charging a violation of Title 18, United States Code, §371. The indictment is 17 pages in length and alleges overt acts which occurred at various places throughout the United States including, and in addition to, Memphis. The indictment simply stated charges a conspiracy to distribute the film nationwide. Most of the defendants did not engage in any direct activity within the Western District of Tennessee.

Although the seized prints, at the present time, are primarily being held as evidence of the crimes alleged in that pending indictment, that hardly is the exclusive need for or evidentiary value of the prints. To say the least the prints presently held represent the initial evidence of numerous substantive violations of §1462, not to mention the local violations in jurisdictions which literally span the length and breadth of the United States. The pending indictment returned February 15, 1973 does not include any local exhibitors as co-conspirator-defendants. This is so only because their number is so great that it is not logistically possible to proceed with prosecutions of all such possible defendants in a single location. However, to require the return of the seized prints, in addition to requiring relinquishment of the evidence in the presently pending criminal case in Memphis, would effectively make impossible prosecutions of other violations in other jurisdictions by suppressing the critically vital evidence for such prosecutions.

ARGUMENT

I

Did the prayer for money damages from Respondent in Petitioners' Complaint invest the district court with any power or authority?

Petitioners initiated the action which resulted in the appeal, which is the subject of their Petition here, by filing a Complaint against Respondent as an individual and in his capacity as an Assistant United States Attorney. The United States is not a named party-defendant. The district court was alleged to possess jurisdiction, and did assume jurisdiction, under Title 28, United States Code, §1331. The injunctive relief sought clearly is demanding action on the part of the sovereign which neither Respondent nor any other named defendant could effect except in his representative capacity. That aspect of the lawsuit clearly is a suit against the sovereign, and the fact that it is denominated against specifically named persons is immaterial. *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 687 (1949); and *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963)

In addition the Complaint seeks money damages against Respondent for violation of the constitutional rights of Petitioners. However, neither in the Complaint nor the Amended Complaint did Petitioners allege any conduct on the part of Respondent, or any co-defendant, was engaged in which was not in performance of their duties as government officials nor outside the realm of discretion placed on them by their office. In fact, the only reasonable reading of the Complaint and Amended Complaint requires an interpretation that all actions alleged specifically were taken in an official capacity and were well within their discretion. In fact, Petitioners claim injury as a result of

execution of search warrants issued by independent judicial officers of the United States. In effect Petitioners allege that the exercise by Respondent of discretion in performance of the duties of his office caused monetary loss to Petitioners. There is a single reference that the Respondent exercised this discretion in "bad faith". However, there is nothing alleged to indicate that the "faith" of Respondent, bad, good or indifferent, was manifest by actions not authorized by the dictates of Respondent's office.

It is elementary that Title 28, United States Code, §1331 does not extend any waiver of sovereign immunity of the United States. To the extent that the suit here initiated seeks relief against the United States, it is barred from its inception by the doctrine of sovereign immunity. There is not now, nor has there ever been, any waiver by the United States whereby one can seek a civil remedy against the United States, the purpose of which is to gain return of property seized as evidence of a crime. On the other hand this is not to say that one is denied remedy against an unlawful seizure. But, the exclusive remedy is that created by *Federal Rules of Criminal Procedure*, Rule 41. Thus, the filing of the Complaint here could not have the effect of granting or creating in the district court a power which it did not have; and, the attempted assumption by the district court of power to act was futile.

As to the relief sought against Respondent, he too is immune from *suit* by the doctrine of official or quasi-judicial immunity unless his actions were either outside the perimeters of his authority or the duties of his office and not within the realm of discretion necessarily imposed on him by his office. Short of such actions, the district court is *powerless* to take any action under a Complaint filed for the purpose of obtaining relief against an officer.

If the necessary allegations against an officer are made by Complaint, it is allowable for a district court to assume sufficient temporary power over the purported controversy to determine if there might be some facts sufficient to support the allegations and, therefore, establish power in the district court to continue in the case. However, where retained counsel skillfully files a Complaint with no allegation of acts by an official outside the scope of his office and without his discretion, no power ever invests in the district court to take any action but dismiss the Complaint. Thus, here again the attempt of the district court in the instant matter to assume jurisdiction was futile and of no effect. *Barr* v. *Matteo*, 360 U.S. 564 (1959) and *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971)

In this case the district court, apparently realizing the tenuous basis for jurisdiction, cited *Fifth Avenue Peace Parade* v. *Hoover*, 327 F.Supp. 238, 240 (S.D.N.Y., 1971) as authority for its exercise of jurisdiction. In the first place, the instant case hardly presents the extenuating circumstances there present, i.e., "a topic of considerable controversy and discussion" and "that if it is not heard in federal district court, it probably will not be heard at all." However, what's more, a district court cannot *create* power. *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922).

In conclusion, where there was no basis at all upon which the district court below could take any action, it is an absolute absurdity to allow Petitioners to continue to obtain appellate review of the action taken as if there were some legitimacy to the proceeding. Nevertheless, this Brief will proceed to show that all actions taken by Respondent were supremely correct in law and fact, but this is not to be interpreted as abandonment of this, the primary contention of Respondent.

II

Does DiBella v. United States, 369 U.S. 121 (1962), prohibit an appeal from the decision of a district court denying return to persons who are defendants in a pending criminal case of items which are evidence in that criminal case?

In the case of *DiBella* v. *United States,* 369 U.S. 121 (1962), it was held to be beyond question that never, under any circumstances, could an interlocutory appeal be taken by defendants in a criminal proceeding from a ruling at the trial court level adverse to them until the proceeding became final at that level. It was further held that in determining whether or not an appeal was in a criminal case, the essence of the lawsuit would be judged by the relief sought, as opposed to, whether the lawsuit was superficially denominated as "civil" or criminal. The mere fact that jurisdiction at the trial court level is invoked under a civil remedy by an action collateral to the pending criminal case does not change the character of the lawsuit *in esse,* and, to qualify as separate, the "civil" action must have independence vel non. Where an action is designed to obtain the return of property to defendants held as evidence in a pending criminal proceeding, although the defendants have assumed the position of plaintiffs in the "civil" action, it does not possess requisite finality for appeal. The facts in the instant matter belie any assertion that the effort of Petitioners is any more than just that. The clear and unequivocal principle of law set out in *DiBella* v. *United States,* 369 U.S. 121 (1962) has been held applicable in the context of an attempted appeal by criminal defendants in an effort to obtain review of a district court decision where the defendants moved pre-indictment for return of books adjudged obscene in an adversary hearing. See *United States* v. *Peachtree National Distributors,*

456 F.2d 442 (5th Cir., 1972). In that decision the Court of Appeals stated in its opinion as follows in 456 F.2d at 444:

> "We are not unmindful of appellants first amendment claims; we simply do not reach them."

The Court of Appeals below recognized the import of the *DiBella* decision in its opinion where it stated as follows in 503 F.2d at p. 136: (See also Petition p. 24, Appendix C.)

> "These precise evils are what *DiBella* sought to prevent, and were it not for the competing policy urged by the plaintiffs-appellants, and examined below, this appeal would be dismissed forthwith."

The Court of Appeals went on in its decision to characterize the "competing policy" to be the rights guaranteed under the First Amendment concerning the right to free exercise of *speech*. Thereby, the Court of Appeals created a hitherto unknown exception to the rule of law articulated in *DiBella* v. *United States*, 369 U.S. 121 (1962). In creating this exception, it is respectfully submitted that the Court of Appeals completely misapplied and misconstrued the holding in *Heller* v. *New York*, 413 U.S. 483 (1973).

III

Is material adjudicated obscene by a district court, after a full adversary hearing on the issue, subject to any protection under the First Amendment?

In *Heller* v. *New York*, 413 U.S. 483 (1973) a fact situation was present where there had been a pre-adversary hearing seizure of a film. Post-seizure there had been an adversary hearing; however, the question presented was whether or not the seizure of the film prior to an adver-

sary hearing completely invalidated the seizure so as to cause suppression of the film as evidence in an ensuing criminal prosecution. It was held that since there was probable cause for the initial seizure and a post-seizure adversary hearing, the initial seizure was not illegal, and the film could be retained by the prosecution for use as evidence in its criminal case. In that context, it was held that between the time of the initial seizure and the adversary hearing, the *exhibitor* from whom the film had been seized must be given an opportunity to copy the seized film for continued distribution until there had been an adjudication based on an adversary hearing. Even this right to copy was contingent on the exhibitor demonstrating that he had no other copies of the film available for distribution during the time intervening between the seizure and the adversary hearing.

In the instant case there was no pre-adversary hearing seizure and the possessor of the film was not an exhibitor. The film itself was physically brought to district court by employees of a common carrier with whom the film had been lodged for transportation. Further, the Order To Show Cause which initiated the proceeding was served on the exhibitor who had just concluded showing the film, and there was an open court hearing commenced with invitation to anyone who had an interest in the film to participate in an adversary capacity. Before the commencement of the adversary hearir g Michael F. Pleasants, Esq., who is now here representing Petitioners, appeared in district court demanding return of the film but refusing to name anyone whose interest he represented. The district court allowed anyone willing to be subject to the in personam jurisdiction of that court in their handling of the film pending the conclusion of the adversary hearing to request it to return the film to them. No one would accept

such responsibility and the district court was left with no other alternative than to hold the film in its possession as the *res* of the controversy. However, at the request of Mr. Pleasants the already commenced adversary hearing was recessed in order to allow further participation on the part of anyone claiming an interest in the film. A further difference in facts here and there, as conceded by Petitioners on p. 9 of their Petition, and as demonstrated by their conduct subsequent to the commencement of the adversary hearing, they retained several copies of the film for use in exhibition and, in fact, continued exhibition and distribution of "School Girl."

As clearly recognized by the decision in *Heller* v. *New York*, 413 U.S. 483 (1973), after an adjudication, the result of a full adversary hearing, that a film is obscene, there exist no further rights under the First Amendment which relate to such a film. That decision hardly could be construed to contemplate that an exhibitor could continue, after such an adjudication, to distribute the subject film shrouded by any protection afforded by the First Amendment. A thing which is obscene is not speech. Until such an adjudication of obscenity is overturned in a proper proceeding before a competent tribunal, the film remains obscene. In effect this amounts to a holding that the film is included within the category of material regulated by Congress' exercise of its commerce power as manifested by federal obscenity statutes. In the instant case it is hard to imagine how a more complete and thorough adversary hearing could have been conducted. Further, no subpoenas issued nor were any search warrants executed prior to the entry of the Judgment On Obscenity entered September 15, 1972.

However, the Court of Appeals somehow envisioned the *Heller* decision as mandating that Petitioners had some

right vested by the First Amendment to continue distribution and exhibition of materials adjudicated obscene or, to put it another way, to be material regulated by federal obscenity statutes. Based on this misconceived right of Petitioners, the Court of Appeals entertained the appeal of the Petitioners in spite of the clear dictates of *DiBella* v. *United States*, 369 U.S. 121 (1962) to the contrary and required the district court to order that Petitioners be allowed to copy the seized film for continued distribution. When this right, envisioned by the Court of Appeals to exist under the First Amendment, expires is not specified. However, because the First Amendment and obscenity are mutually exclusive and inconsistent, it is abundantly clear that no one has any right bestowed by the First Amendment to do anything with obscene material.

Although it is clear from footnote 8 in *Heller* v. *New York*, 413 U.S. 483, 492 (1973) that multiple copies of a single fim may not be held where such amounts to "purely cumulative evidence," that certainly is not the case here. Indeed, there hardly could be more convincing evidence of a nationwide conspiracy to distribute the film in question than that the owners of the film have copies of the same film placed at various locations throughout the United States with exhibitors, processors, shippers and warehouses. Further, the very containers in which the films were found bear extremely incriminating evidence as to the use and shipment of this particular film from place to place throughout the United States. These are only two of many observations which could be made concerning the extreme importance of these particular prints as evidence of the crime alleged in the pending indictment.

It also is interesting to note that in the recent case of *G. I. Distributors, Inc.* v. *Murphy*, 469 F.2d 752 (2nd Cir., 1972) and 490 F.2d 1167 (2nd Cir., 1973), 19,000 copies of

55 separate titles of books and magazines were seized on the premises of a wholesale distributor. In that case a search warrant was issued in an ex parte proceeding authorizing the seizure of six copies each of 55 separate titles. While at the warehouse the officers observed an additional 19,000 copies of the publications, placed them in cartons and posted a guard overnight at the warehouse. An adversary hearing was conducted the next morning, the materials in question were determined to be obscene and a search warrant issued for the remaining 19,000 copies. The Court of Appeals there reversed the district court's holding that the posting of guards at the warehouse constituted a prior restraint which invalidated the entire seizure. By its opinion in that case the Court of Appeals implicitly holds that there is no right to distribute material after it has been adjudged obscene. Petition for certiorari was granted by this Honorable Court, but in *G. I. Distributors, Inc.* v. *Murphy*, 413 U.S. 913 (1973) the decision of the Court of Appeals was vacated and remanded for further consideration. Thereafter, the Court of Appeals reconsidered its prior decision specifically in light of *Heller*, supra, and authored a second opinion holding that *Heller* did not proscribe the seizure and stating that federal injunctive relief under Title 42, United States Code, §1983 is available to require *return* of illegally seized materials alleged to be obscene. See *G. I. Distributors* v. *Murphy*, 490 F.2d 1167 (2nd Cir., 1973). Throughout the subsequent opinion it is abundantly clear that it is a foregone conclusion not even worthy of specific note that after an adversary hearing adjudication of obscenity there exist no rights, First Amendment or otherwise, on the part of the owners of the seized books to possess them. This Honorable Court upon consideration of a petition for certiorari from the second opinion denied the petition on April 15, 1974 in *G. I. Distributors, Inc.* v. *Murphy*, 416 U.S. 939 (1974). Therefore,

it is apparent that there is no right whatever relating to materials judged obscene in an adversary hearing during the pendency of a criminal proceeding connected thereto and obviously quantity is not the sole test as to whether multiple copies are "purely cumulative evidence."

Thus, it must be recognized that the Court of Appeals below already has granted Petitioners more than the law allows and for them to now seek further relief here is a spurious request.

IV

Does the Constitution prohibit or restrict prosecutions for violation of Title 18, United States Code, §371 for conspiring to distribute obscene materials in interstate commerce "throughout the United States" in violation of Title 18, United States Code, §1462?

The Petitioners contend that, in effect, there is no such thing as a prosecutable conspiracy under Title 18, United States Code, §371 to distribute obscene material in interstate commerce "throughout the United States". Based on this premise the Petitioners' argument logically proceeds to the conclusion that the prints seized in the instant case outside Memphis could not be seized and held as evidence of a crime, which they contend, the Constitution does not recognize. In one sense this is a challenge to the second prong of probable cause required for the issuance of a valid search warrant; that is, there must be probable cause that the thing sought to be seized is evidence of a particular *crime*. Petitioners claim that acceptance of their contention leads to the conclusion that the seizures of the prints were illegal and, thus, they are entitled to the injunctive relief which they seek, to wit, return of the seized films.

It has never been, and is not now, conceded that the films seized outside of Memphis are not evidence of the substantive violations which are alleged to have occurred in Memphis, but Respondent's argument will proceed on the basis that this is immaterial since prosecution for a national conspiracy is constitutionally permissible. That such a prosecution in permissible, and *a fortiori* the seizures here being questioned were legal, is necessarily implicit in the holding below by the Court of Appeals.

In order to gain a proper perspective, in the context of the crime charged in the indictment pending, concerning the conspiracy to distribute "School Girl" in interstate commerce a few short observations are in order. The crime alleged in Count One of that indictment is a simple conspiracy. It was a totally completed crime as soon as two or more of the co-conspirators agreed, with knowledge of the general character of the content of "School Girl", to produce the film and distribute it throughout the United States, which, of course, necessarily implies in interstate commerce. Thereafter, as soon as one cameraman was hired (or some similar overt act) was engaged in in execution of the objectives of that agreement, the crime was complete and prosecutable in any jurisdiction where the agreement was consummated or an overt act performed. Though the prosecutive merit would have been nil, theoretically, even if the film never had been finally produced, the crime alleged would have been completed. Insofar as the allegations contained in the indictment are concerned, they merely evidence additional overt acts and the inclusion of additional co-conspirators who joined in the already commenced and continuing crime. The actual distribution of the film is not charged in Count One of the indictment as a crime and any interstate transportation of the film falls in the category of nothing more than an additional overt act evidencing the details and

intent of the agreement. The only relation of Memphis to the crime charged is the allegation that one or more of the overt acts occurred in Memphis. This fact, and this alone, establishes venue in the Western District of Tennessee. For the purpose of analysis, the fact that some of the overt acts which occurred in Memphis include the interstate shipment of the film to Memphis and its exhibition in Memphis is coincidental and superfluous to the fixing of venue there. As to the allegations in the indictment, the relationship of the vast majority of defendants to conduct which occurred in Memphis is indirect.

Though the point never has been spoken to directly, whether or not the Constitution requires the application of a different rule of law concerning venue in a prosecution for a conspiracy to violate federal obscenity statutes than those applied in a conspiracy to violate any other federal statutes, in the decision in *Hamling* v. *United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974), it was noted that that case involved prosecution for conspiring to violate Title 18, United States Code, §1461. See *Hamling*, supra, 41 L.Ed.2d at 605-606. Further, when appraising the evidence of record in that case, the commonly accepted rule of establishing an agreement by circumstances in order to prove conspiracy was specifically cited. See *Hamling*, supra, 41 L.Ed.2d at 625.

Further, references to recent cases decided by this Honorable Court show an inclination not to distinguish offenses related to obscenity from any other type of criminal conduct. Rather, there appears to be a well advised deliberate effort to demonstrate that all of the normally accepted rules of law applicable to crime generally are equally applicable to obscenity violations.

In *Miller* v. *California*, 413 U.S. 15 (1973) the court observed as follows at p. 26:

> "In resolving the inevitably sensitive questions of the facts involved, we must continue to rely on the jury system, accompanied by the safeguards that judges, *rules of evidence, presumptions of innocence and other protective features provide, as we do with rape, murder and a host of other offenses against society and its individual members.*" (Footnote omitted) (Emphasis added)

Of further significance in this connection are observations made in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973) where it was observed as follows at pp. 61-62:

> "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underline much lawful state regulation of commercial and business affairs. (Citations omitted) The same is true of the federal securities, antitrust laws and *a host of federal regulations.* (Citations omitted) On the basis of these assumptions both Congress and the state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing 'coupons' and 'trading stamps', commanding what they must and may not publish and announce." (Citations omitted) (Emphasis added)

Continuing in the same case at p. 62:

> "Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources, our forests, streams and parks, they must act on such imponderables . . . ."

Continuing in the same case at p. 64:

> "We have just noted, for example, that neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares."

Continuing in the same case at pp. 67-68:

> "The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of *drug sales* is not prohibited by the Constitution." (Citation omitted) (Emphasis added)

Continuing in the same case further at fn. 15, p. 68:

> "The State statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fists' prize fights, and duels, although these crimes may only directly involve 'consenting adults.' Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision. (Citations omitted) Consider also the language of the Court in (citation omitted) as to adultery; (citation omitted) as to fornication; (citations omitted) as to 'white slavery' (citations omitted), as to billiard halls; (citation omitted), as to gambling."

The analogy of obscenity and controlled drugs was again recognized in *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973) where it is stated at p. 128:

> "To allow such a claim would be not unlike compelling the Government to permit importation of *prohibited or controlled drugs* for private consumption as long as such drugs are not for public distribution or sale." (Emphasis added)

This Honorable Court seemed to summarize its attitude concerning whether or not there is any permissible distinguishing characteristic between obscenity and any other criminally regulated conduct by the following observation in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973) where it says at p. 62:

> "Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography."

In the context of discussion concerning federal statutes prohibiting commerce in obscenity this Honorable Court repeatedly recognized, under Article I, §8, Cl. 3 of the Constitution, Congress has the exclusive and plenary jurisdiction to determine what items may be prohibited from movement in the stream of interstate or foreign commerce. In *United States* v. *Orito*, 413 U.S. 139 (1973), it was observed as follows at p. 143:

> "Given (a) that obscene material is not protected under the First Amendment (citations omitted), (b) that the Government has a legitimate interest in protecting the public commercial environment by preventing such material *from entering* the stream of commerce (citation omitted) . . . we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because material is intended for the private use of the transporter . . . . Congress may regulate on the basis of the natural tendency of material . . . . Congress could reasonably determine such regu-

lation to be necessary to effect permissible control of interstate commerce in obscene material, based as that regulation is on legislatively determined risk of ultimate exposure . . . ." (Emphasis added)

In the same case further discussion appears at p. 144:

"'The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.' (Citations omitted) 'It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.'" (Citation omitted)

In *Orito* the matter was discussed further at p. 144, fn. 6:

"'Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote the immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce . . . .'"

In *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973), discussing the power of Congress over the regulation of the transportation of obscenity in foreign commerce, it is noted at pp. 125-126:

"The Constitution gives Congress broad, comprehensive powers '[t]o regulate Commerce with foreign Nations.' Article 1, §8 . . . The plenary power of Con-

> gress to regulate imports is illustrated in a holding of this Court which sustained the validity of an Act of Congress prohibiting the importation of 'any film or any other pictorial representation of any prize fight . . . designed to be used or [that] may be used for purposes of exhibition' in view of 'the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles . . . .'" (Citations omitted)

In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), quoting from *Griswold* v. *Connecticut*, 381 U.S. 478, 482 (1965), the limited prerogative of the judicial branch in such matters was noted as follows at p. 64:

> "'We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.'"

This Honorable Court three times specifically analogized Congress' exercise of its commerce power over movement of obscene materials to the same exercise of power over movement of white slaves and gambling paraphernalia. See *United States* v. *12-200 Foot Reels*, 413 U.S. 123, 128, fn. 6 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 68, fn. 15 (1973); and *United States* v. *Orito*, 413 U.S. 139, 144, fn. 6 (1973). This is a very significant analogy. Neither prostitution nor gambling is prohibited in all states and in every state there are some differences in the laws regulating the activity reflecting more or less tolerance from state to state. The likenesses or dissimilarity of states' regulation of this conduct is coincidental. However, if two contiguous states declared by legislation that there is not, nor ever has been, any such thing as prohibited gambling or prostitution in either of the con-

[illegible] states, this would make it no less a violation of federal regulatory statutes to transport a prostitute or dice table between those two states. Furthermore, if a third person had placed a phone call from a third state, which initiated the transportation, the fact that both prostitution and gambling offenses in that state were capital offenses would not deprive the federal court in the third state of venue to try the federal conspiracy violation. The only question there to be resolved is whether the material or person transported was a prostitute or gambling device under federal law apart from the law of any of the [illegible] including the forum, states. That the jurors in the forum court might possibly be influenced by the mores of the place of their upbringing in making that determination is unavoidable and not unconstitutional. Finally, no one seriously suggests that this exercise of power by Congress of transportation of women for immoral purposes or gambling devices fixes the moral standards concerning these matters throughout the United States as that of the most restrictive moral standards prevailing in a particular state.

In *United States* v. *12-200 Foot Reels*, 413 U.S. 123, 130, n. 7 (1973), this Honorable Court describes that which is the subject of federal obscenity statutes as "regulated material" and says that it is prohibited from *entering* commerce. Further, in *Miller* v. *California*, 413 U.S. 15, 24-25 (1973) there is a detailed description of obscenity and throughout that discussion the word "regulation" was used in reference to the material being described. Thus, the ultimate question in determining whether or not there has been a violation of federal obscenity statutes is whether particular material in question falls within the category of that regulated.

It is the contention of Petitioners that a geographically defined local community standard mandatorily is an *element* of each violation of a federal obscenity statute. Based on this contention, Petitioners claim that any violation of a federal obscenity statute is prosecutable only in the district where a particular defendant directly has been involved with that material in that district. This is claimed necessary because only in that district can a jury be assembled which can determine what the particular community standard is within the specified political boundaries.

The position of Petitioners is ill-founded on several bases. In the first place geography is of little, if any, significance ever in determining what community standards are applied by a jury to determine if material is obscene. Never has it been *required* that any forum anywhere located apply standards identifiable only with and in a particularly designated geographical community. If there were ever any doubt on this point, it certainly was removed by *Hamling* v. *United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974). The *Hamling* decision specifically states in 41 L.Ed.2d at 613:

> "Miller rejected the view that the First . . . Amendments *require* that the proscription of obscenity be based on uniform nationwide standards of what is obscene . . . . But in so doing the Court *did not require* as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' " 413 U.S. at 24. (Emphasis added)

Hamling goes on in 41 L.Ed.2d at 613:

> "Our holding in Miller that California *could* constitutionally proscribe obscenity in terms of a 'statewide' standard *did not mean* that any such precise geographic area is *required*, as a matter of constitutional law." (Emphasis added)

The subject was more clearly addressed in *Jenkins* v. *Georgia*, ... U.S. ....., 41 L.Ed.2d 642 (1974) where it is stated at 648:

> "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution *does not require* that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. Miller *approved* the use of such instructions; *it did not mandate* their use . . . . We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' *without specifying what 'community'*. Miller held that it was constitutionally *permissible to permit* juries to rely on the understanding of the community from which they came as to contemporary community standards, ... A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in Miller *without further specification*, as was done here, or it *may* choose to define the standards in more precise geographic terms, as was done by California in Miller." (Emphasis added)

Therefore, it becomes imperative to sound analysis to make a clear distinction between what is required and what is permitted when seeking to determine the constitutional requirement as related to community standards. The simplest logical precepts dictate that merely because

a thing is permitted does not make it required. Never is it *required* that the word "community" be considered in geographical terms. When one seeks to impose a requirement that geographically defined local community standards be mandatorily applied in a federal obscenity prosecution, in addition to logically absurd conclusions, constitutional barriers arise.

From a logical standpoint, the only conclusion one could reach is that Congress in exercise of its plenary and exclusive power over commerce would have legislated against the movement of a nonentity. In other words, Congress has specifically said that obscene material may not *enter* the channels of commerce. However, if that which is prohibited from *entering* that stream would not be definable until after entry, this is an absurdity. If that were the case, it would be impossible for one to know whether he had violated the law until after the violation occurred. In effect, that would be telling the constituency bound by the legislation to do whatever you want and we will later determine if what you did was a violation of the law. That is the very essence of the constitutional prohibition against bills of attainder and ex post facto application of criminal law.

However, there is still another logical inconsistency in requiring application of a geographically defined local community standard in a federal prosecution. In *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973) it specifically was held that Title 19, United States Code, §1305(a), prohibiting the importation of obscene material into "the United States", was constitutional. Further, it is now beyond question that a national community standard is "unprovable", "hypothetical" and "unascertainable". But if the geographically definable local community standards are required to be applied in order to identify that

which is obscene, this prohibition by Congress in exercise of the commerce power to prohibit the entry into the "United States" of obscene material is totally meaningless. Such a judicially imposed restriction on the exclusive and plenary power of Congress over commerce would amount to a repeal of that statute and the substitution of one which would merely prohibit bringing into a particular port of entry materials which exceeded that local community's standards.

That which Congress has prohibited from *entering* the stream of commerce essentially must be something which is identifiable and definable before its movement. Such material remains in the regulated category before its movement, during its movement and throughout its very existence. To conclude otherwise renders nugatory the clearly constitutional exercise of the commerce power of Congress.

Another necessary effect of concluding that geographically definable local community standards control the very definition of "obscenity" under federal obscenity statutes is that bodies politic not empowered to do so are vested with power to declare a constitutionally exercised power placed by the Constitution solely and exclusively with Congress of no effect.

For the purpose of illustrating this point, it is immaterial what is the proper means of expression by a local community as to what, if any, standards it has concerning obscenity. It is further immaterial what the geographic dimensions of the community are determined to be. By federal statutes prohibiting interstate and foreign commerce in obscene material Congress has prohibited the movement of such from one state to another. However, under the geographical definable local community standards argument, if two contiguous states simultaneously

declared by some appropriate means that there were no standards appertaining to obscenity, then material declared by Congress to be regulated and impermissible to move in commerce could freely flow between those two states and a congressional enactment thereby would be nonoperative and effectively repealed in an area of the United States. Further, if that is a possibility as to two states it is possible as to all fifty states and there then would be a valid congressional enactment which would have become totally unenforceable. There could be no clearer violation of the Commerce Clause imagined.

The judicial branch may declare legislation inoperative *only* if it is unconstitutional. No other body, organized or not, within the framework of our society has any power whatever to negate or ignore at will an enactment of Congress. Here the statutes in question specifically have been declared by this, the highest court in the land, to be constitutional. Thus, no group of people anywhere have the power either to expand or render effectively invalid the pertinent statutes. The First Amendment cannot be so construed that it tends to encroach on the powers of Congress under the Commerce Clause. As noted above, First Amendment absolutism is an unacceptable form of reasoning when considering the relationship of speech to obscenity to constitutional dictates. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62 (1973) Each and every constitutional provision must be given equal validity and force with every other and a course charted which is compatible with all.

This Honorable Court clearly has recognized that the thing that is prohibited from channels of commerce by the federal obscenity statutes was a thing in existence, definable and identifiable before it ever moved. *United States v. Orito*, 413 U.S. 139 (1973), stated at p. 143:

> "The Court has consistently rejected constitutional protection for obscene material outside the home. (Citions omitted)....
>
> [t]he Government has a legitimate interest in protecting the public commercial environment by preventing such materials from *entering* the stream of commerce. . . . ." (Emphasis added)

Obviously that statement contemplates something in existence which is prohibited from crossing a state line prior to any movement whatever and that it is identifiable as obscenity before such movement. Both *United States* v. *Orito*, 413 U.S. 138 (1973) and *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973) discussed and rejected the *reasoning* process based on what was known as the "correlative right" theory as it related to one's right to possess obscene material in the confines of his own home. That right itself necessarily is based on two assumptions. The first is that the thing possessed is in fact and law obscene; and, the second is that one has a constitutional right to possess that obscene thing in his home. In the context of discussing this correlative right theory it is noted in *United States* v. *12-200 Foot Reels*, 413 U.S. 123 (1973) as follows at p. 128:

> "Nor is there any correlative right to transport obscene material in interstate commerce."

That very statement necessarily is based on the same two assumptions above referred to when considering the correlative right theory in relation to one's home. The plain import of that statement is that the same logical reasoning process which refutes the correlative right theory as it relates to possession of obscenity in one's home, also, refutes any purported reasoning process which would have the possibility of allowing one to transport obscene material

outside a given state irrespective of whether that material is obscene when applying local community standards within the state where it is possessed or the local community standards within the community outside that state in or to which it is transported. Such a theory would amount to a re-emergence of the rejected correlative rights theory on the basis that the material one possessed in his own home was acceptable there, and it also was acceptable in his neighbor's home, therefore, he possessed the right to transport it from his home to that of his neighbor. This clearly is not the law and has been clearly recognized as not being the law by this Honorable Court.

Petitioners here, in support of their ill-founded contention, seek to find refuge in this Honorable Court's prior pronouncements recognizing the obvious fact that standards concerning tolerance in depiction of sexual conduct are not necessarily the same in Maine and Mississippi. See Petition p. 16. What Petitioners lose sight of is that this observation comes in the context of considering states separately as individual entities and units of government with the population of each having control over its own destiny to a certain degree apart from the whims of other like-situated entities. That is to say, that the people of the State of Maine should be free, within that State, to decide that nothing is obscene or that much is obscene and that the people of Mississippi should be given the same prerogative irrespective of what conclusion the State of Maine might reach on the same subject. However, nothing in these observations implies that the people of the State of Maine have a right to export their standards outside of that State or be allowed to import into that State from other states materials fitted to the standards arrived at within that State. Nor does anything in these observations imply that if the people of the State of New Hampshire have reached the same conclusion as to the

standards as the State of Maine, then the people in those two states have a right to exchange between the borders materials which are regulated by valid congressional enactment in exercise of the control of Congress over commerce. Such movements of "regulated materials" between Maine and New Hampshire creates a pollution of the stream of commerce of equal concern to every other citizen of the United States be he situated in Maine or New Mexico.

Those contending for the position of Petitioners often refer to this Honorable Court's prior observations concerning the fact that different juries situated in different places might reach contradictory verdicts when adjudging the obscenity of the same material. See *Miller* v. *California*, 413 U.S. 15, 26, fn. 9 (1973). Again, quite often such persons miss the mark as to the import of these observations. The importance of the observations is that no one can ever be assured that a jury different from the precise twelve people assembled at any given time will reach this same conclusion on any given set of facts. The point perhaps is more cogently made by an illustration not related to obscenity. A person could be tried on a charge of first degree murder in Connecticut and found guilty by a jury there assembled. All of the parties and all of the same participants could take a transcript of that exact proceeding and re-enact the entire trial before another jury assembled in Texas applying the same law and the jury there might acquit. Or even more poignantly made, another twelve jurors may hear an identical case in the identical courtroom in Connecticut and acquit. However, this fact of life does not impeach the viability of the jury system nor the law applied. This is merely a fact of life inherent in our system of government and the geography of the situation is not controlling, but to the extent that the geography of the situation has any

effect, it too is a mere fact of life which does not portend unconstitutionality.

Finally, it is often urged that to allow venue to be established in a national conspiracy to distribute obscene material "throughout the United States" in the same manner that venue is established with any other type of violation would place in the hands of prosecutors the right to institute the prosecution in a district where it is determined that the tolerance in depiction of sexual material was most restricted, thereby making that standard the one controlling the entire nation. Even if that were a true observation, it fails to recognize that the government could likewise select a place to institute the prosecution which has the most lenient restrictions, thereby making those standards applicable to the remainder of the nation. Thus, such an observation cuts both ways as to persons at either end of the spectrum. It is no more applicable when discussing obscenity than when discussing white slavery or gambling. Since as a matter of fact it is a fanciful assertion in the first place, it is superfluous in its entirety.

In a federal prosecution under the obscenity statutes, the only question to be determined is whether specifically identified material falls in the category of that which Congress has regulated by the pertinent statute. That conclusion has absolutely no effect on what is tolerable within the borders of any particular state. The only consequence of a decision in a federal obscenity prosecution is that the particularly specified material may not be transported from one state to another or imported or exported within or without the United States. In fact, it is very possible that in a district which, by some appropriate means, has removed all restrictions as to the depiction of sexual matter, a jury might determine that the particular

material before it fell within the category of that regulated by the congressional enactment. By the same token, it is possible that in a district where there is much restriction on the depiction of sexual matter, material wholly unacceptable in that local community could be adjudged not within the category of material regulated by the pertinent congressional enactment. What may or may not be shipped in interstate commerce is not related at all to what may or may not be allowed to flow in commerce intrastate. This is the clear import of the comment in *Hamling*, supra, 41 L.Ed.2d at 614:

> "But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside this particular district, if it felt such evidence would assist the jury in the resolution of the issues which they were to decide."

Of course, the ultimate issue to be decided by the jury in a federal prosecution is whether the material before them falls within a category of that regulated by the pertinent congressional enactment. In order to determine that fact the jurors are not bound to consider *only* the community standards prevailing within the boundaries of the district, state, city limits or precinct in which they sit or from which they were called. By the same token, they are not restricted from referencing those particular standards if relevant to the inquiry. To the degree that any particular juror might be affected by the standards with which he is most familiar by virtue of his residence in reaching this ultimate conclusion on the fact issue, this again is a mere fact of life inherent in our system of government which does not subvert the administration of substantial justice, comports fully with constitutional requirements and exists irrespective of the verbiage which might be used in an instruction to him. Further, in our

highly mobile society today, it is hardly uncommon for jurors to be selected, in any district in the United States, whose upbringing has been outside, and many times far removed from, the district in which he is called to serve. Under such a circumstance that juror's personal life might have been more influenced by a community other than the one in which he serves. There again this constitutes no constitutional problem. The object is to allow each juror a framework within which he can function without subverting the best possibilities for substantial justice by instructions which tend to confuse and stymie, such as seeking to impose on him the impossible burden of divining a nonexistent "national standard". Finally, it is presumptuous to conclude that every juror is so narrow-minded that it is impossible for him to consider factors outside his personal experience.

Of course, the First Amendment restricts all legislative bodies, be it Congress or the city council, equally in the matter of regulation of communication. However, the First Amendment as it relates to community standards has no mandatory geographical significance. The only relation of the First Amendment to geography under the community standards test is that it is permissive so as to allow local governments to define the community standards in geographical terms if, and only if, the responsible legislative body chooses to so define the community standards. In addition to what has already been pointed out in this connection, *Hamling* v. *United States*, ... U.S. ....., 41 L.Ed.2d 590 (1974) speaks to this point as follows at p. 628:

> "'As the Court made clear in Mishkin v. New York, 383 U.S. at 508-509, *the primary concern* with requiring a jury to apply the standard of "the average person, applying contemporary standards" is to be certain that . . . it will be judged by its impact on an average

> person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.'" 413 U.S. at 33 (Emphasis added)

The point was further addressed in *Hamling*, supra, 41 L.Ed.2d at 614-615:

> "This Court has emphasized on more than one occasion that a *principal concern* requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." (Citations omitted) (Emphasis added)

Again in *Hamling*, supra, 41 L.Ed.2d, at 613:

> "The juror is *entitled* (it should be noted this is not *required*) to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, *just as* he is *entitled* to draw on his knowledge of the propensities of a 'reasonable' person in *other areas of the law*." (Citations omitted) (Emphasis added)

Here again it is emphasized that the most appropriate analogy to the function of a juror in a federal obscenity case in determining the "community" standard is to the same non-empirical type determination that a juror is required to make when determining whether conduct of a litigant was commensurate with that of a reasonable person. Such a determination would not have geographical significance in the sense that political boundary lines would in any way enter in his conclusion. To the extent that geographical considerations play a part in a jury's determination of the standard of care in a tort suit in a federal

court, such considerations may play a part in a jury's determination of the standard of the average person applying contemporary standards in a federal obscenity prosecution. Geography is no more or less significant nor mandatory or permissive in one than the other.

The constitutional significance of the community standards requirement is summarized in *Hamling*, supra, 41 L.Ed.2d at 613-614:

> "The result of the Miller cases, therefore, *as a matter of constitutional law* and federal statutory construction, is to *permit* a juror sitting in obscenity cases *to draw on* knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." (Emphasis added)

This Honorable Court went on to say in *Hamling*, supra, 41 L.Ed.2d at 615 that the only time reversal would be required in this connection is when the charge to the jury failed to advise that they could not apply either their personal opinions or those of the most sensitive or most insensitive persons applying contemporary community standards. As noted above, in *Jenkins* v. *Georgia*, __ U.S. __, 41 L.Ed.2d 642, 648 (1974) it is perfectly permissible to instruct a jury to apply contemporary community standards without any further specification concerning the geographical significance of the word "community". This creates no impediment whatever and is suggested by Respondent to be most desirable in a federal prosecution.

Seen in this light there is no need for any special provisions of law concerning venue for conspiracies to violate federal obscenity laws any more than the need for

such special provisions for antitrust, securities or "a host of other federal regulations." In each case "regulated material" and conduct is the subject of prosecution and the primary inquiry, wherever the prosecution may be, is whether there has been commerce in the "regulated material." Except that in one case the "regulated material" is obscenity and the other the regulated material is stolen motor vehicles, which is an irrelevant difference, the observation made in the context of a nationwide conspiracy involving interstate transportation of regulated material, i.e., stolen motor vehicles, made in *United States* v. *Nasse*, 432 F.2d 1293 (7th Cir., 1970) is equally controlling in a nationwide conspiracy to transport obscenity interstate. The observation is found in 432 F.2d at 1297:

> "Here, unlike Kotteakos, the defendants knew that illegal acts on the part of the chain of participants-counterfeiters, camouflagers, people who transport the stolen autos and salesmen—were necessary to the total operation."

Therefore, there exists no reason, in fact or law, why a prosecution for conspiring to violate federal obscenity laws should be treated in any way any differently than violation of any other federal law. That is to say that there is nothing about obscenity that makes it any less susceptible of distribution nationwide than any other regulated material. If such regulated material is in fact distributed throughout the nation, it would be virtually impossible for it to be done without a plan and agreement to do so by at least two persons with overt acts at least as widespread as the distribution. One who engaged in such a far-reaching plan and agreement accompanied by conduct, he, not the government or the law as such, but he alone exposes himself to multiple places where venue might lie. Needless to say that some of the places for

venue will be more convenient and tactically more advantageous than others; but, this is true irrespective of the nature of the crime. Further, the defendants create the situation, not the prosecutor. Too, it is not the purpose of the law to meet the convenience of or provide tactical advantages to those who offend its provisions. The only rights of a criminal defendant which the judiciary can recognize are statutory and constitutional.

There certainly is no statutory right which would prohibit prosecution of a nationwide conspiracy to distribute obscene material "throughout the United States" and the suggested constitutional right based on a geographically local community standard argument which would localize venue is spurious and absurd. As this Honorable Court has given indication, there is absolutely no mandatory geographical significance to the word "community" in this context. Under the present state of the law the word "community", when used in the phrase "contemporary community standards" in relation to the definition of obscenity, is a superfluous relic which is confusing to the public at large, the judiciary and the bar. Further, this word, because its most common usage connotes a geographical dimension, provides rich fodder for those whose designed objective it is to inject confusion and foster turmoil in this area of law to their own gain. Thus, though better practice would be to completely discard use of the word "community" in this connection, Petitioners are completely out of place in seeking reversal of the decision of the Court of Appeals below which, at least, gave obeisance to the correct non-geographical meaning of "community", even though that was done only by implication.

In conclusion the Court of Appeals for the Sixth Circuit was imminently correct in its holding that the seizures of the copies and negatives of "School Girl" in various parts of the United States was appropriate and that the

crime charged in the indictment, i.e., conspiracy, for which these copies and negatives are evidence, is controlled by *Hamling* v. *United States,* ..... U.S. 41 L.Ed.2d 590 (1974)

CONCLUSION

Respondent mistakenly was under the impression that this Honorable Court had granted an extension of time up to and including February 21, 1975 within which Respondent could file a Cross-Petition For Certiorari. Instead, the extension of time granted was only for the purpose of allowing a Conditional Petition For Certiorari. Thus, although Respondent personally feels that, because of the important questions raised, justice throughout the Nation would best be served by a resolution of these issues by this Honorable Court, he is now precluded from so petitioning.

As is so often the case bad precedent develops in the law when, as here, there is action taken at the trial court level which is based on an erroneous concept. Here, all of the difficulties which have since arisen would have been avoided had the district court, in accordance with the law, recognized that it was powerless to act and dismissed the Complaint. However, the district court failed to do that and the appellate process needlessly was cluttered with frivolous issues. The error of the district court was then compounded by the Court of Appeals' failure to recognize the error of the district court and remanding the case with instructions to the district court to correct its error by dismissing the Complaint. Instead, the Court of Appeals considered the case and rendered a reported decision, as if there were some legitimacy to the initial proceeding, and created binding precedent which results in a split in the law in the circuits on two vital issues which portends grave consequences which very likely will un-

necessarily increase attempts to gain review by this Honorable Court of countless cases. The end result is that, in addition to injecting unfortunate confusion in substantive law, it counteracts the ends of justice inherent in the most efficient functioning of the appellate process. How to best thwart these unfortunate results is the dilemma now facing this Honorable Court.

By its decision below the Court of Appeals created an exception to the doctrine of *DiBella* v. *United States*, 369 U.S. 121 (1962) prohibiting interlocutory appeals in a criminal case stating, in effect, that if a defendant can fashion an argument that an adverse ruling at the district court level in some way tends to interfere with his or someone else's First Amendment rights, then an interlocutory appeal is permissible. This is in direct contradiction to the ruling in *United States* v. *Peachtree National Distributors*, 456 F.2d 442 (5th Cir., 1972). The ruling of the Court of Appeals below sets up a "right" to an interlocutory appeal in virtually every federal obscenity prosecution not to mention any other criminal case where an inventive defendant could make such an argument. This potential difficulty could be solved by vacating the decision of the Court of Appeals below with instructions to reconsider the application of the precepts of *DiBella* v. *United States*, 369 U.S. 121 (1962) as applied in *United States* v. *Peachtree National Distributors*, 456 F.2d 442 (5th Cir. 1972).

The decision of the Court of Appeals below also, creates a right which entitled defendants in a criminal obscenity prosecution, after a full adversary hearing adjudication of obscenity of subject materials, to be supplied with the means, i.e., copies, to continue distribution or exhibition of that material for some unspecified period of time. This clearly is a result not contemplated or sanctioned by *Heller* v. *New York*, 413 U.S. 483 (1973). Further, it is

in virtual contradiction to the holding in *G. I. Distributors, Inc.* v. *Murphy*, 490 U.S. 1167 (2nd Cir., 1973), cert. den. 416 U.S. 939 (1974) interpreting the specific provisions of *Heller*. To allow the decision below to remain unabated as reported precedent on this point creates an opportunity for courts throughout the Nation to separately rely on either of the two divergent interpretations of *Heller*, thereby, causing total confusion virtually from district to district. But, by the same token all of the district courts in the Sixth Circuit *now* are bound to a different rule than that binding all of the district courts in the Second Circuit. Too, these rules involve exceedingly important substantive rights of the Petitioners and all like situated criminal defendants, as well as rights of prosecutors. It is just such confusion as this that resulted from unchallenged and uncorrected divergent interpretations of *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964) and *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961) which led to the deterioration of the law in this area for many years prior to the *Miller* decisions. The same process resulted in the emergence of the unfounded "national" community theory. If vigilance is not exercised, by nipping each divergence in its bud, to insure that never again will there be such an onslaught of confusion in judicial precedent as preceded *Miller*, the same state of chaos in the law could develop. This vigilance could be simply exercised in the instant case by vacating the decision of the Court of Appeals below and remanding the case for reconsideration of the holding in *Heller* v. *New York*, 413 U.S. 483 (1973) in light of *G. I. Distributors, Inc.* v. *Murphy*, 490 F.2d 1167 (2nd Cir., 1973), cert. den. 416 U.S. 939 (1974).

Perhaps this Honorable Court might wish to choose even another alternative. By simply vacating the decision of the Court of Appeals below and remanding the case with instructions to dismiss the appeal and remand to the dis-

trict court with instructions to the district court to dismiss the Complaint, this Honorable Court could accomplish the above goals and preclude the possibility that other aspects of the same case might again unnecessarily clog the appellate process and waste the valuable time of this Court by consideration of a second Petition For Certiorari. Further, this would have the effect of correcting all of the various errors made below at each level.

Finally, neither the Court of Appeals nor the district court below rendered any decision which would preclude the prosecution of the pending conspiracy indictment. Neither did either of the courts below even indicate a leaning toward an erroneous holding that geographically confined local "community" standards were definitional of obscenity. In fact, the inclination of the Court of Appeals' decision seems to be correct on this point. See, *Smith* v. *United States*, ... F.2d ....., CCA #73-2062 (6th Cir., Nov. 13, 1974) and *United States* v. *Carter*, ... F.2d ....., CCA #74-1150 (6th Cir., Nov. 21, 1974). Both of these cases are reported in *Sixth Circuit Review*, December 2, 1974, Vol. 3, No. 20, pp. 5-6. Thus, this Brief speaks to that point only in opposition to the position of Petitioners to demonstrate the correctness of all of the actions taken by Respondent.

In conclusion Petitioners are not entitled to any relief which they seek by their Petition For Certiorari and should be denied same.

Respectfully submitted,

LARRY E. PARRISH
Respondent, Pro Se
178 North Yates Road
Memphis, Tennessee 38117
Telephone: 901-682-1067

APPENDIX AA

No. C-72-179

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL ACTION
NO. C-72-179

UNITED STATES OF AMERICA
V.
TWO CARTONS CONTAINING ONE MOTION PICTURE FILM ENTITLED: "School Girl"

ORDER TO SHOW CAUSE

Upon consideration of the Application of the United States of America which has been filed on the 26th day of May 1972, it is hereby

ORDERED that whoever has possession of two (2) cartons containing motion picture film entitled "School Girl" shall appear with said motion picture film before this court on the 11th Floor, Federal Office Building, 167 North Main Street, Memphis, Tennessee, at 9:30 a.m. on the 30th day of May, 1972 and then and there show cause, if any there be, why said motion picture film should not be declared obscene and a search warrant executed authorizing the seizure of said motion picture film. It is

FURTHER ORDERED that the United States Marshal for this District, or his authorized deputy, shall, upon

finding said motion picture film, apply thereto seals to the cartons containing said motion picture film in such a manner that said cartons cannot be opened without breaking said seals. It is

FURTHER ORDERED that said motion picture film shall be brought to this court as above ordered with the seals placed thereon by the United States Marshal, or his authorized deputy, for this District, intact. It is

FURTHER ORDERED that said motion picture film shall not be removed from the Western Judicial District of Tennessee nor in anyway altered or tampered with prior to its being presented to this court as above ordered. It is

FURTHER ORDERED that the United States Marshal for this District, or his authorized deputy, shall personally serve a copy of this Order and the Application For An Order To Show Cause filed herein by the United States on the manager of the Studio Theater, 535 South Highland, Memphis, Tennessee and any other person in whose custody or possession said motion picture film is found. It is

FURTHER ORDERED that the United States Marshal for this District, or his authorized deputy, shall obtain personal service forthwith an attested copy of this Order on the person in charge at Bonded Film Storage Company, Fort Lee, New Jersey. It is

FURTHER ORDERED that if any person or other business entity claims an interest in the possession or control of said motion picture film, said person shall appear before this court at 9:30 a.m. on the 30 day of May, 1972, then and there prepared to show cause, if any there be, why said motion picture film should not be subject

to execution of a search warrant authorizing the seizure of said motion picture film.

ENTER May 26, 1972.

/s/ Robert M. McRae, Jr.

APPROVED:

Thomas F. Turley, Jr.
United States Attorney
By /s/ Larry E. Parrish
Larry E. Parrish
Assistant United States Attorney

No. 74-749

FEB 12 1975

INDEX

Page

Opinions below 1
Jurisdiction 1
Questions presented 1
Constitutional provisions and statutes involved 2
Statement 2
Argument 7
Conclusion 12

CITATIONS

Cases:

A Quantity of Books v. *Kansas*, 378 U.S. 205 10
Cogen v. *United States*, 278 U.S. 221 8
DiBella v. *United States*, 369 U.S. 121 ..... 5, 6, 7, 8
Edelman v. *Jordan*, 415 U.S. 651 2
Gutierrez v. *Waterman S.S. Corp.*, 373 U.S. 206 2
Hamling v. *United States, No. 73-507, decided June 24, 1974* 11
Heller v. *New York*, 413 U.S. 483 ..... 6, 8, 9, 10
Marcus v. *Search Warrant*, 367 U.S. 717 10
Matson Navigation Co. v. *United States*, 284 U.S. 352 2
McGrath v. *Kristensen*, 340 U.S. 162 2
Miller v. *California*, 413 U.S. 15 ..... 10, 11

Page

Rochester Tel. Corp. v. *United States* 307 U.S. 125 2
United States v. *Calandra*, 414 U.S. 338 8
United States v. *Corrick*, 298 U.S. 435 2
United States v. *Peachtree National Distributors*, 456 F. 2d 442 8
United States v. *Orito*, 413 U.S. 139 10
United States v. *12 200-ft. Reels of Film*, 413 U.S. 123 ..... 10, 11
United States v. *Two Cartons Containing One Motion Picture Film Entitled: "School Girl,"* 447 F. 2d 599 3

Constitution, statutes and rules:

U.S. Constitution, First Amendment 9,10
18 U.S.C. 371 ..... 2, 5, 11
18 U.S.C. 1462 ..... 3, 4, 5, 11
18 U.S.C. 1465 4
28 U.S.C. 1291 3
Federal Rules of Criminal Procedure:
Rule 17 11
Rule 17(c) 3

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-749

ART THEATRE GUILD, INC. AND SHERPIX, INC., PETITIONERS

v.

LARRY E. PARRISH, THOMAS F. TURLEY, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 503 F. 2d 133. The memorandum decision of the district court (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on September 24, 1974. The petition for a writ of certiorari was filed on December 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to entertain the appeal.

2. Whether copies of a film determined, after an adversary hearing, to be obscene may be seized pursuant to search warrants in a number of locations for use as evidence in a criminal proceeding, when the copies are necessary and relevant to such proceeding and the distributor is permitted to make copies of the film.

3. Whether 18 U.S.C. 371, as applied in this case, is constitutional.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions and statutes involved are set forth in Appendix D to the Petition at pp. 43-44.

STATEMENT

Upon the government's application, the United States District Court for the Western District of Tennessee issued an order on May 26, 1972, directing the possessors of the film "School Girl" to show cause why the film should not be declared obscene and a warrant should not be issued authorizing the film's seizure (Pet. App. A, p. 20). The district judge viewed the film and a three-day adversary hearing was conducted.[2] The court declared

---

[1]Although the government unsuccessfully challenged below the court of appeals' jurisdiction, we do not believe it necessary to cross-petition on this issue. This Court must notice jurisdictional errors, even *sua sponte*, if they have not been raised by the parties. See, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 677-678; *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209; *McGrath* v. *Kristensen*, 340 U.S. 162, 167; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 128, n. 3; *United States* v. *Corrick*, 298 U.S. 435, 440. A claim of lack of jurisdiction "may be considered, and appropriate judgment given, at any stage of the proceedings, either here or below." *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 359. If the court of appeals lacked jurisdiction to consider the merits, then of course this Court likewise lacks jurisdiction to review the merits by writ of certiorari.

[2]The district judge viewed the film on May 30, 1972, but delayed consideration of the obscenity issue to permit persons claiming an interest in the film to assemble proof on the issue and to present it in court (Pet. App. C, pp. 31-32).

the film to be obscene and authorized the government to retain it for a possible prosecution under 18 U.S.C. 1462[3] (Pet. App. C, pp. 31-32). The court of appeals dismissed the appeal from this ruling, holding that since the district court's order related to a pending criminal proceeding it was not appealable under 28 U.S.C. 1291. *United States* v. *Two Cartons Containing One Motion Picture Film Entitled: "School Girl,"* 477 F. 2d 599 (C.A. 6).

On September 11, 1972, a grand jury sitting in the Western District of Tennessee returned a one-count indictment charging Art Theatre Guild, Inc.—one of the present petitioners and a participant in the prior adversary hearing—and one of its employees with having violated 18 U.S.C. 1462 by knowingly transporting an obscene motion picture ("School Girl") in interstate commerce. Shortly thereafter, grand jury subpoenas were issued for production of additional prints of the film and for records pertaining to its distribution and showing. Prior to the return date of the subpoenas, Art Theatre Guild, Inc., and Sherpix, Inc., the other petitioner here, instituted the present suit seeking an injunction against further seizures of prints of the film pursuant to the subpoenas and damages against the respondents (Pet. App. C, pp. 32-33).[4]

The district court treated the suit as a motion to quash the subpoenas pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. The court orally granted the motion to quash on October 6, 1972, insofar

---

[3]Among other things, 18 U.S.C. 1462 prohibits knowingly "transporting in interstate commerce "any obscene, lewd, lascivious, or filthy * * * motion-picture film * * * ."

[4]Petitioners asserted in their complaint, which was filed on September 28, 1972, that they owned all prints and negatives of the film "School Girl."

as it applied to the seizure of additional prints of the film, on the ground that the government had not established sufficiently that additional prints were required at that stage of the investigation. The court required those served with the subpoenas, however, to retain the prints in their possession, to refrain from altering or destroying them and to maintain certain records concerning their locations (Pet. App. C, p. 33).

After the district court partially quashed the outstanding subpoenas, the government secured search warrants from United States magistrates in several jurisdictions authorizing the seizure of any prints or negatives of the film found in the places designated in the warrants. One of the affidavits submitted with the applications for the warrants stated that the prints were needed in connection with a continuing investigation of a possible conspiracy to distribute the film in violation of 18 U.S.C. 1462 and 1465 (Pet. App. C, pp. 33-35).

On November 1, 1972, the present petitioners filed in the district court a motion for a preliminary injunction, complaining that execution of the search warrants was inconsistent with the court's dispostion of the motion to quash the subpoenas. After a conference in chambers, the court directed petitioners to amend their earlier complaint to reflect events which had occurred subsequent to the court's ruling with respect to the subpoenas. On November 3, 1972, petitioners filed a supplemental motion for a preliminary injunction, seeking to restrain further execution of the search warrants. Petitioners filed an amended and supplemental complaint on November 24, 1972 (Pet. App. C, pp. 33-35).

The district court denied petitioners' motion for a preliminary injunction (Pet. App. C, pp. 30-42). The court stated that in cases involving an ongoing investigation of possible criminal activities, a court must proceed "with great restraint and caution" (*id.* at 36). The court also noted that the relevant circumstances had changed since its quashing of those portions of the subpoenas directing the production of additional prints of the film and that, in light of those changed circumstances, petitioners had not carried their burden of showing harassment or bad faith by the government.

According to the court, "a blanket restraint on the U.S. Attorney [such as that sought by petitioners] against attempts to obtain evidence in furtherance of bona fide investigations and prosecutions for violations of the United States laws would be equally as repugnant as authorizing a massive seizure without a prior adversary hearing" (Pet. App. C, p. 41). The court, however, stated that its decision was not meant to relieve the government of its overriding responsibility not to seize any material not relevant and necessary to the criminal prosecution and to return promptly any material found to be unnecessary after a good faith seizure (*id.* at 41-42). 41-42).

The court of appeals affirmed (Pet. App. B, pp. 28-29). It pointed out that two and one-half months after the district court denied petitioners' motion for a preliminary injunction, an indictment had been returned superseding the indictment against Art Theatre Guild, Inc. The new indictment charged petitioners and others with substantive violations of 18 U.S.C. 1462 and with having conspired, in violation of 18 U.S.C. 371, to distribute an obscene motion picture ("School Girl") nationwide. Given this fact, the court noted that in the usual case the order would be non-appealable under *DiBella* v. *United States*, 369 U.S. 121.

The court proceeded to the merits of the present case, however, because of "the competing policy" urged by petitioners—encompassed in their alleged right to continue to distribute the film pending final resolution of the pending criminal proceeding (Pet. App. A, pp. 22-24).

With respect to the merits the court of appeals stated that its task was essentially to fashion a holding as consistent as possible with *DiBella* and *Heller* v. *New York*, 413 U.S. 483. In *Heller* this Court rejected the claim that the seizure of one print of a film subsequently found to be obscene constituted an impermissible prior restraint. The court noted that it was particularly significant that prior to seizure the film had been viewed by a neutral and detached magistrate, the seizure was for the bona fide purpose of preserving the print as evidence in a criminal proceeding and there was no showing or pretrial claim that the seizure prevented the film's continued exhibition.

As in *Heller*, the court of appeals in the present case pointed out that seizure of prints of the film "School Girl" had been preceded by " 'an * * * independent judicial determination of obscenity by a neutral detached magistrate * * * [and] the seizures [were] made to preserve evidence for a criminal prosecution ' " (Pet. App. A, p. 27). Because the seizure of more than one print of the film was involved here, however, the court remanded the case to the district court with directions to determine whether any material seized was not relevant and necessary as evidence in the criminal prosecution and to permit petitioners to make copies of those prints which had been seized and which were necessary and relevant to that proceeding *(ibid.)*.

ARGUMENT

Petitioners have posed two questions for review by this Court, one of which was considered and resolved against them by the court of appeals and the second of which they seek to raise now for the first time. We submit that petitioners' contentions are unsound, and that the court of appeals correctly refused to order the return of the prints of the film "School Girl" seized pursuant to the search warants. We also believe, however, that the court of appeals lacked jurisdiction to entertain petitioners' appeal and that, accordingly, there is no reason for this Court to reach the merits of the questions that petitioners present.

1. The court of appeals lacked jurisdiction over petitioners' appeal.

In *DiBella* v. *United States*, 369 U.S. 121, this Court held that the denial of a motion for the return of property and for its suppression in a criminal prosecution is not appealable because it is not a final judgment. The policy reasons underlying this holding are equally applicable to the present case. For example, the Court pointed out in *DiBella* that to permit immediate review of the denial of a motion to suppress would entail "serious disruption to the conduct of a criminal trial." *Id.* at 129. Petitioners have not suggested how this disruption would be lessened by their framing their challenge to the government's use of prints of the film "School Girl" in the form of a "separate" civil proceeding rather than the usual motion to suppress.

The Court also observed that permitting direct appeal of suppression orders would often lead to undue pre-indictment delays and jeopardize the availability of other evidence. It is irrelevant, therefore, that at the time the warrants were issued in the present case an indictment

had been returned against only one of the petitioners. In fact, a superseding indictment was subsequently returned against a number of other persons as well—an event that might have been delayed, if not jeopardized, had either the district court's decision or earlier action by the court of appeals impeded presentation of additional prints of the film before the grand jury.

Finally, in *DiBella* the Court noted that appellate review is an inappropriate and inadequate vehicle for testing the admissibility of evidence at trial or the prosecution's need to obtain particular evidence. For this reason, the Court stated that orders denying motions to suppress would be appealable only when the motion is "solely for return of property and is in no way tied to a criminal prosecution *in esse* against a movant * * *." *Id.* at 131-132. Neither of the present petitioners has or could successfully advance such a claim, and it therefore follows that the court of appeals should have dismissed petitioners' appeal for want of jurisdiction. See also *United States* v. *Calandra*, 414 U.S. 338, 354 n. 10; *Cogen* v. *United States*, 278 U.S. 221, 227-228; *United States* v. *Peachtree National Distributors*, 456 F.2d 442, 444-445 (C.A. 5).

2. The court of appeals' decision strikes a proper balance between the need to preserve prints of the film "School Girl" as evidence in the pending criminal proceeding and petitioners' asserted right to continue to distribute and show the film.

In *Heller* v. *New York*, 413 U.S. 483, this Court held that, given the fact that a print of a film may be easily destroyed, altered and/or transported, it may be seized pursuant to a search warrant for preservation as evidence in a criminal proceeding (a) if the finding of

probable cause upon which the warrant was issued was the result of an independent judicial determination and (b) if the seizure was promptly followed by a determination of the obscenity issue in an adversary proceeding. In recognition of the rights of the exhibitor during the period between the initial seizure and the adversary proceeding, however, this Court further held that the exhibitor should be permitted to obtain a copy of the film if he demonstrates that no other copy is available to him. *Id.* at 492-493.

The decision of the court of appeals in the present case provides even greater protection to any First Amendment rights petitioners may have than the procedure provided in *Heller*. The search warrants here, unlike the warrant in *Heller*, were obtained after, not before, an adversary hearing on the issue of obscenity (a hearing which petitioners do not contend was inadequate). Thus, the basis for the seizure of prints of the film "School Girl" was even firmer than the basis found sufficient in *Heller*.

Despite this fact, moreover, the court of appeals took the additional step of directing the district court to determine whether the prints seized were necessary to the criminal prosecution and to permit the petitioners to make copies of those prints whose seizure was required. The purpose of this was to ensure that petitioners would continue to be able to distribute and show the film until the issue of its obscenity was finally resolved.

Petitioners seek to distinguish *Heller* on the ground that there only one copy of a film was seized, and the right of continued exhibition pending a final determination of the obscenity issue was easily protectable, but that ten to twelve prints of "School Girl" have been seized and their rights cannot be protected in a similar manner

(Pet. 8-10). Petitioners admit, however, that not all prints of the film were seized (Pet. 9).[5] More importantly, the court of appeals' decision ensures that only those prints required for the criminal prosecution will be retained, that any prints not required will be returned, and that any prints required and hence not returned will be made available for copying.[6] In these circumstances, given the perishability of film paints (*Heller* v. *New York*, *supra*, 413 U.S. at 493) and the fact that the film was declared to be obscene at the conclusion of an adversary hearing (cf. *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Marcus* v. *Search Warrant*, 367 U.S. 717), the court of appeals' decision adequately protects any First Amendment rights that may be involved. Cf. *United States* v. *Orito*, 413 U.S. 139, 143; *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 126; *Miller* v. *California*, 413 U.S. 15, 23.

---

[5]Petitioners contend that the fact that most prints of the film remain in circulation does not mean that they will be shown. According to petitioners, exhibitors will not continue to rent and show the film if, by so doing, they risk seizure of the print they have rented and the consequent loss of whatever investment they have made in advertising the film. At the same time, however, petitioners concede that exhibitors will not be reluctant to rent the film if all prints are subject to certain record-keeping requirements and to ultimate production at trial in Tennessee. There is no reason to suppose, and petitioners advance none, that exhibitors would be any more reluctant to rent the film if informed that, should the print rented be required for the criminal prosecution in Tennessee, they will be provided a substitute print.

[6]Petitioners argue that permission to make copies of any prints properly retained by the government does not adequately protect their First Amendment rights since the cost and difficulties involved in copying makes the solution "unrealistic and unworkable" (Pet. 11). But petitioners have offered no evidence to that effect, and their unsupported allegations are not an adequate substitute.

3. Petitioners also contend that 18 U.S.C. 371 is unconstitutional insofar as it permits a criminal prosecution for a nationwide conspiracy on the basis of a finding of obscenity in a single community (Pet. 15-18). Petitioners did not raise this issue below,[7] and we submit that it is, in addition, premature since the criminal proceedings have just been begun.

The thrust of petitioners' constitutional challenge is that a conspiracy charge bottomed on an alleged substantive violation of federal obscenity statutes may be no more extensive geographically than the localities from which jurors will be drawn. This conclusion is dictated, according to petitioners, by the test for obscenity announced in *Miller* v. *California*, 413 U.S. 15. It assumes, moreover, that in deciding whether material is obscene, individual jurors are limited by the *Miller* test to applying the standards of their own communities.

This argument overlooks the decision in *Hamling* v. *United States*, No. 73-507, decided June 24, 1974. The Court held in that case that in determining whether a violation of federal obscenity statutes has been established, jurors may draw upon their knowledge of their community, as well as such evidence of the "average person" in other areas of the country as petitioners determine to introduce. Slip op. 15-16. This affords petitioners adequate protection that the film "School Girl" will not be judged "on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group" (*id.* at 17), while at the same time avoiding the application of an unascertainable national standard. See *United States* v. *12 200-ft. Reels of Film, supra*; *Miller* v. *California, supra*.

---

[7]In their complaint, petitioners did assert that 18 U.S.C. 1462 and Rule 17, F.R. Crim. P., were unconstitutional.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

ROBERT E. KOPP,
DAVID M. COHEN,
Attorneys.

FEBRUARY 1975.

LIBRARY
SUPREME COURT, U. S

FILED
FEB 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74—749.

ART THEATRE GUILD, INC., and SHERPIX, INC.,
Petitioners,

v.

LARRY E. PARRISH, THOMAS F. TURLEY, JR., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT, LARRY E. PARRISH.

RALPH J. SCHWARZ, JR.,
22 East 40th Street,
New York, N. Y. 10016.

EDMUND C. GRAINGER, JR.,
501 Fifth Avenue,
New York, N. Y. 10017.

FRIERSON M. GRAVES, JR., and
MICHAEL F. PLEASANTS,
First National Bank
Building, Suite 2020,
Memphis, Tenn. 38103,
Attorneys for Petitioners.

Table of Contents.

Page

Preliminary Statement 1

Point I. The District Court plainly had jurisdiction to entertain the action and the power to grant injunctive relief. (Reply to Parrish Brief—Point I.) 4

Point II. The Sixth Circuit correctly held plaintiffs' action was an action independent of the criminal action and correctly refused to dismiss the appeal. (Reply to Parrish Brief—Point II.) 6

Point III. The preliminary hearing determination of obscenity was an evidentiary hearing, authorizing only an evidentiary seizure based on a standard of probable cause and was not a final judgment. The nationwide seizure of the master negative and the film prints based thereon is a clear First Amendment violation: the Government was adequately protected by the hold subject to subpoena order. (Reply to Parrish Brief Point III.) 10

A. The adversary hearing was an evidentiary hearing to authorize an evidentiary seizure, was based on a standard of probable cause and was not a final determination on the merits 11

B. There can be no suppression of a film until there is a final judgment after a full trial 13

C. The direction to hold subject to subpoena adequately protected the Government 14

Page

Point IV. 18 U.S.C. 371 is overbroad as applied to justify the seizure of the negative and film prints throughout the country. (Reply to Parrish Brief—Point IV.) 17

A. The overbreadth of 18 U.S.C. 371 as applied to justify seizures is properly before this court as a First Amendment procedural question 17

B. 18 U.S.C. 371 as applied is overbroad to justify nationwide seizures and treat films as contraband and Mr. Parrish's own arguments confirm this 19

C. 18 U.S.C. 371 is both overbroad and unduly vague as applied on a substantive as well as a procedural law basis 21

Conclusion. The writ of certiorari should be granted 29

TABLE OF CASES.

A Quantity of Books v. Kansas, 378 U. S. 205 (1964) 13

American News Company v. Ladas, 454 F. 2d 1237 (6th Cir. 1972) 2, 3, 8

Barr v. Matteo, 360 U. S. 564 (1959) 5, 6

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U. S. 388 (1971) 5, 6

Brooks v. United States, 267 U. S. 432 (1925) 22

Cain v. Kentucky, 397 U. S. 319 (1970) 22, 25

Page

Cinema Classics, Ltd. v. Busch, 339 F. Supp. 43 (C.D. Cal. three judge court 1972), aff'd *sub nom.* Busch v. Cinema Classics, Ltd., 409 U. S. 807 (1972) 3, 8

DiBella v. United States, 369 U. S. 121 (1962) 6, 10

Dugan v. Rank, 372 U. S. 609 (1963) 5

Fifth Avenue Peace Parade Committee v. Hoover, 327 F. Supp. 238 (S.D. N.Y. 1971) 6

Freedman v. Maryland, 380 U. S. 51 (1965) 13

Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931) 4, 5

Hamling v. United States, U. S. , 41 L. Ed. 2d 590 (1974) 18, 21, 27, 28

Heller v. New York, 413 U. S. 483 (1973) 2, 6, 7, 8, 13, 20

Jacobellis v. Ohio, 378 U. S. 184 (1964) 22, 25

Jenkins v. Georgia, U. S. , 41 L. Ed. 2d 642 (1974) 21, 27, 28

Malone v. Bowdoin, 369 U. S. 643 (1962) 5

Manual Enterprises, Inc., v. Day, 370 U. S. 478 (1962) 28

Marcus v. Search Warrant, 367 U. S. 717 (1961) 18, 20

Miller v. California, 413 U. S. 15 (1973) 19, 20, 21, 22, 24, 25

Paris Adult Theatre I v. Slaton, 413 U. S. 49 (1973) 14, 19, 27

Page

Perial Amusement Corp. v. Morse, 482 F. 2d 515 (2d Cir. 1973) 13

Ren v. United States, 350 U. S. 214 (1956) 5

Roaden v. Kentucky, 413 U. S. 496 (1973) 20

Roth v. United States, 354 U. S. 476 (1957) 22, 25

Smith v. Goguen, 415 U. S. 566 (1974) 27

Tyrone, Inc., v. Wilkinson, 410 F. 2d 639 (4th Cir. 1969) 8, 17

United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913) 22, 24

United States v. Orito, 413 U. S. 139 (1973) 19, 22, 23, 27

United States v. Peachtree National Distributors, 456 F. 2d 442 (5th Cir. 1972) 9, 13

United States v. Thirty-Seven Photographs, 402 U. S. 363 (1971) 13

United States v. 12-200 Ft. Reels, 413 U. S. 123 (1973) 19, 26

United States v. Two Cartons Containing One Motion Picture Film Entitled "School Girl," CCA #72-1972 (6th Cir. May 10, 1973) 7, 8, 9, 13

Weber v. Freed, 239 U. S. 325 (1915) 22

AUTHORITIES.

57 Am. Jur. 2d, Negligence, Sec. 78 26

In the

Supreme Court of the United States

October Term, 1974.

No. 74-749.

Art Theatre Guild, Inc., and Sherpix, Inc.,

Petitioners,

v.

Larry E. Parrish, Thomas F. Turley, Jr., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT, LARRY E. PARRISH.

Preliminary Statement.

This is a reply to the brief of respondent Larry E. Parrish, Assistant United States Attorney, Western District of Tennessee, appearing *pro se* (hereafter generally "Parrish" or "defendant Parrish"). The respondents collectively shall be referred to as "defendants." The opinion of the Sixth Circuit is reported at 503 F. 2d 133 (6th Cir. 1974) and is reproduced in Appendix A of the petition.

The most *critical issue* is the one which Mr. Parrish attempts to set forth in Question 3 of the Parrish brief, page 3, which covers essentially the same ground contained in Question 1 and Point I-A and Point I-B of

the petition. Mr. Parrish's misdescription of the meaning and consequence of the August 1972 adversary hearing determination of obscenity is exactly the error made by the Sixth Circuit in its adaptation of *Heller v. New York*, 413 U. S. 483 (1973).

The August 1972 adversary hearing determination of obscenity was a *preliminary evidentiary hearing determination authorizing the seizure of one film print for evidentiary purposes based on a standard of probable cause and was not a final judgment* (pet., pp. 8, 9 and Point III-A, *infra*). *It may not justify massive nationwide seizures* (pet., Point I-A and B and Point III-B), especially when defendants were fully protected by the District Court hold subject to subpoena order (pet., Point I-C, Point III-C).

From the outset Mr. Parrish treated the August 1972 preliminary adversary hearing determination as if it were a final judgment of obscenity. On this erroneous basis he urges in his Point III that after the adversary hearing, "there is no right whatever relating to materials judged obscene in an adversary hearing" (Parrish br., p. 21), and hence the nationwide seizures were justified.

Plaintiffs on November 3, 1972, asked the District Court for mandatory injunctive relief ordering a return of the master negative and film prints on the basic grounds here urged. The District Court denied injunctive relief because the adversary hearing was binding on Art Theatre Guild, Inc. (App. C-41), and because plaintiffs had not proved that the seizures were undertaken in bad faith (App. C-41).

But plaintiffs did not and do not have any burden of alleging or proving bad faith as a condition of securing the return of the material. *American News Co. v. Ladas*,

454 F. 2d 1237 at 1240 (6th Cir. 1972); *Cinema Classics, Ltd., v. Busch*, 339 F. Supp. 43, 48, 50 (C. D. Cal. three judge Ct. 1972), aff'd *sub nom. Busch v. Cinema Classics, Ltd.*, 409 U. S. 807 (1972).

The Sixth Circuit held, nonetheless (App. A, p. 27, 503 F. 2d at 137), that the District Court had found that Sherpix, Inc., was the owner of the film, that the *adversary determination was binding* on Sherpix and that therefore there was no abuse of discretion in permitting a massive seizure.

The Sixth Circuit notation that the District Court found that the adversary hearing was binding on Sherpix happens to be wrong. The District Court held specifically (App. C, p. 41) that there "is insufficient proof in the record * * * to make the former adversary hearing binding upon Sherpix." But in this case it is immaterial—*the case boils down to what is the meaning and consequence of an adversary hearing?*

The basic error of the Sixth Circuit is its validation of defendants' position and its holding that under *Heller* a preliminary adversary determination of obscenity authorizes a massive seizure for any purpose.

While Mr. Parrish is a very capable attorney the following must also be noted:

On October 6, 1972, the District Court quashed multiple subpoenas for production of the negatives and film prints holding that the criminal conspiracy investigation could not justify suppressing the nationwide distribution (App. A, p. 21). Nonetheless three weeks later Mr. Parrish did by search and seizure exactly that which the District Court held on October 6, 1972, he could not do by subpoena.

Mr. Parrish claims (Parrish br., pp. 7, 8) that the District Court's October 6, 1972 order to hold the material subject to subpoena (App. C, p. 33) was not workable. But defendants took no appeal. Defendants took no steps in the District Court to modify any of the alleged deficiencies even though some of those supposed deficiencies could have been eliminated (Point III-C). Instead Mr. Parrish took the law into his own hands. We submit that is not proper.

In any event defendants claim that the District Court's hold subject order was not workable is completely specious (Point III-C).

POINT I.

The District Court plainly had jurisdiction to entertain the action and the power to grant injunctive relief.

(Reply to Parrish Brief—Point I.)

Defendant Parrish urges that the District Court was without jurisdiction to entertain the action for injunctive relief on the grounds of sovereign immunity. This point was raised by defendants in the Sixth Circuit and while not conclusive the Sixth Circuit obviously rejected it.

The District Court has the clear power to enjoin United States Attorneys and federal agents from violating constitutional rights and to direct the return of material seized in violation of constitutional rights. *Go-Bart Importing Co. v. United States*, 282 U. S. 344 at 354, 355 (1931) (the United States Attorney and the Special Agent in charge are subject to the jurisdiction of the Court and

id., at 358, injunctive relief granted against the United States Attorney directing return of the material and enjoining its use); *Rea v. United States*, 350 U. S. 214 at 217 (1956) (*id.*, at 219, even the dissenters agreed the "federal courts undeniably have the power to issue an injunction in this case"). We note in *Go-Bart* and *Rea* the grant of injunctive relief turned on a violation of constitutional rights, not on a showing of bad faith.

The doctrine of sovereign immunity concerning officers of the executive branch does not apply when the manner in which they are exercising their powers are in violation of constitutional rights. *Dugan v. Rank*, 372 U. S. 609 at 621 (1963); *Malone v. Bowdin*, 369 U. S. 643 at 647 (1962). That certainly includes seizures in violation of First Amendment rights. The relief sought by plaintiffs did not and does not have anything to do with any decree or order running against the sovereign.

Defendant Parrish's brief, page 14, citing *Barr v. Matteo*, 360 U. S. 564 (1959), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388 (1971), urges a variant of the sovereign immunity argument, to wit, that officials of the Federal Government have immunity from damage claims.

On November 24, 1972, defendants moved in the District Court to dismiss the complaint and for summary judgment on essentially the same grounds here urged (App. C, p. 35) which motion was argued on March 23, 1973. Judge McRae never ruled on this motion. It is not before this court.

We also note that while bad faith is an issue on a damage claim, United States Attorneys do not have any absolute sovereign immunity even from a damage claim.

But all this has nothing whatsoever to do with the power of the Court to grant injunctive relief.

Barr and *Bivens* do not contain any suggestion that inclusion of a damage claim divests the Court of power to grant injunctive relief.

The District Court cited *Fifth Avenue Peace Parade Committee v. Hoover*, 327 F. Supp. 238 (S.D.N.Y. 1971) (App. C, p. 36), for the proposition that jurisdiction is to be exercised with great caution and not, as Mr. Parrish's brief, page 14, contends, because it recognized any tenuous basis for jurisdiction.

Sovereign immunity is no bar to the grant of injunctive relief.

POINT II.

The Sixth Circuit correctly held plaintiffs' action was an action independent of the criminal action and correctly refused to dismiss the appeal.

(Reply to Parrish Brief—Point II.)

Respondent Parrish urges that the Sixth Circuit was wrong in refusing to dismiss the appeal on the basis of *DiBella v. United States*, 369 U. S. 121 (1962), and supposedly created an unknown exception to *DiBella* and supposedly misapplied *Heller*.

Mr. Parrish has not, however, attempted to distinguish the case law set forth on page 14 of plaintiffs' petition. Where there is a seizure by law enforcement officials of allegedly obscene materials in connection with criminal

prosecutions, but also in violation of the First Amendment rights, the First Amendment gives rise, and *Heller* made it clear it still does give rise, to two separate and independent rights: (i) the independent right to mandatory injunctive relief for a return of the material seized in violation of the First Amendment, and (ii) the application of the exclusionary rule on the criminal prosecution for the violation of the First and Fourth Amendments.

These two rights are and they must be maintained as separate independent rights or otherwise persons and firms exercising First Amendment rights will not be able to have their day in Court to even try to vindicate First Amendment rights. Mr. Parrish's brief makes that plain.

The preliminary adversary hearing of August, 1972, was held pursuant to a May 26, 1972 order to show cause filed as a civil action case entitled *United States of America v. Two Cartons Containing One Motion Picture Film Entitled "School Girl,"* No. C-72-179 (appeal dismissed as an attempt to perfect an interlocutory appeal, CCA No. 72-1972, 6th Cir., May, 1973). This order to show cause is reproduced in Appendix AA of Mr. Parrish's brief, pages 49, 50, and that show cause matter hereafter is called *United States v. School Girl.*

While the propriety of the order to show cause in *United States v. School Girl* and the May 1973 dismissal of the appeal is *not* before this court the disposition thereof demonstrates vividly why, if there is a massive seizure, actions or proceedings by whatever name to vindicate First Amendment rights must be the subject of a separate and independent right or action.

On May 30, 1972, in the District Court Mr. Pleasants raised several objections to the show cause order includ-

ing an objection pertinent to Point III, *infra*, that a probable cause standard with no built-in safeguards could not be applied at the proposed adversary hearing. All objections including a motion for a return of the film print were overruled by the District Court.

An appeal was taken which included objections to a probable cause standard and the obscenity determination. On defendants' motion the Sixth Circuit in May, 1973, dismissed the appeal in *United States v. School Girl* as non-final.

The preliminary adversary hearing ruling that "School Girl" was obscene was issued August 31 (or August 30, 1972) and the present indictment was returned February 15, 1973, about 5-1/2 months later. In the intervening period of time and thereafter defendants treated the adversary hearing ruling as if it was a final judgment authorizing the nationwide seizures. But on the appeal from that ruling defendants persuaded the Sixth Circuit that it was non-final. Thus Mr. Parrish would leave the distributor with no recourse.

Any criminal obscenity case with its potential jail consequences involves multiple considerations in addition to search and seizure. At the same time the criminal obscenity cases often involve mass seizures.

Hence, the case law does and must mandate a return of material as a separate right so as to permit the continued distribution, exhibition, or sale, pending the final adjudication in any criminal prosecution and leaving to the criminal prosecution the application of the exclusionary rule under the First and Fourth Amendments. *Cinema Classics, Ltd., supra*, 339 F. Supp. at 48, 50; *American News Company v. Ladas, supra*, 454 F. 2d at 1240; *Turner, Inc., v. Wilkinson*, 410 F. 2d 639 at 641, n. 4 (4th Cir. 1969); *Heller, supra*, 413 U. S. at 493, n. 11.

United States v. Peachtree National Distributors, 456 F. 2d 442 (5th Cir. 1972), cited by Mr. Parrish, does not support his position and really supports the position of plaintiffs. In *Peachtree, supra*, as the Fifth Circuit opinion shows, the District Court at the request of the United States Attorney issued a search warrant for a search of a trailer and a temporary restraining order restraining the disposition of books and magazines in the trailer. The District Court (see 456 F. 2d at 444) issued a finding of fact and law that there was "probable cause to believe that the materials" were obscene, and entered an order that the search warrant be issued and the Government retain the material in its possession for criminal proceedings (*id.*, at 444).

In *Peachtree* the appellants (respondents in the District Court) did not offer testimony, though they were invited to. However, the *Peachtree* proceedings were essentially similar to the order to show cause proceedings in *United States v. School Girl*. There was a hearing to determine whether a search warrant should issue, which was exactly the purpose of the order to show cause in *School Girl*. There was a probable cause determination of obscenity and an order that the material in *Peachtree* be held for the criminal case, which as the District Court opinion in this case shows (App. C, p. 32) was exactly the order entered following the determination that the film "School Girl" was obscene.

Peachtree, supra, held that that initial determination was not appealable under *DiBella* just as the Sixth Circuit held that the order in *School Girl* was not an appealable order.

However, the United States Attorney in the Peachtree case did not take the District Court probable cause determination of obscenity and go all over the country seiz-

ing 40 to 50% of all copies of each title of each and every book and magazine which had been "declared obscene" together with the typeset and plates from which the magazine pictures were made. That is what happened in this case.

The independent character of the proceedings for the purposes of the final judgment rule turn on the reality of the rights being asserted. *Heller* recognized that the right to continue the distribution or exhibition of presumptively protected material until there is a final judicial determination of obscenity is a separate and independent right. Where there is unconstitutional prior restraint, and especially where it is nationwide, actions and proceedings to vindicate First Amendment rights are and must be independent.

DiBella does not apply.

POINT III.

The preliminary hearing determination of obscenity was an evidentiary hearing, authorizing only an evidentiary seizure based on a standard of probable cause and was not a final judgment. The nationwide seizure of the master negative and the film prints based thereon is a clear First Amendment violation; the Government was adequately protected by the hold subject to subpoena order.

(Reply to Parrish Brief—Point III.)

A preliminary evidentiary hearing determination of obscenity authorizing a seizure of one film print based on a standard of probable cause may not, as here, be used to justify nationwide seizures as if it were a final judgment.

A. The adversary hearing was an evidentiary hearing to authorize an evidentiary seizure, was based on a standard of probable cause and was not a final determination on the merits.

1. The District Court stated in its December 1, 1972 opinion (App. C, p. 32) that the Court found the film "School Girl" obscene and

> "authorized the seizure of the film with regard to the investigation of a possible violation of 18 U. S. Code §1462."

The District Court opinion could not be plainer. The adversary hearing was an *evidentiary hearing to obtain authorization for an evidentiary seizure.* The hearing did not remotely purport to be a full trial and the determination could not be and was not a final judgment.

2. It is obvious from a reading of the order to show cause that the only standard which could be applied to the adversary hearing of August, 1972, was probable cause. The order to show cause (Parrish br., App. AA, p. 49) directed that whoever had possession of the film show cause why it "should not be declared obscene and a *search warrant executed* authorizing the seizure" of the film and (pp. 50, 51) "why said motion picture film should not be subject to *execution* of a search warrant." (Italics supplied.)

Search warrant issuances are governed by F. R. Crim. P. 41(c). As plaintiffs' main brief, page 9 stated, F. R. Crim. P. 41(c) provides that the test is probable cause. The adversary hearing was initiated by an order to show cause which sought authority to execute a search warrant. *The test for the issuance of a search warrant is probable cause* and the adversary hearing proceeded on the basis of a standard of *probable cause.*

3. On November 3, 1972, plaintiffs filed their motion for a preliminary injunction accompanied by a twelve (12) page November 2, 1972 affirmation of Ralph J. Schwarz, Jr.

The Schwarz November 2, 1972 affirmation (p. 2, bottom, and p. 3) stated:

> "The defendant's position as a matter of law is very plain. Defendant Parrish believes that the August 31, 1972 decision of this court *on preliminary probable cause determination hearing* entitle the defendants to obtain a search warrant and seizure authorization from every federal magistrate in every city of the country authorizing seizure of the prints and negatives of the motion picture even though, it may be added as stated that the magistrates in the different parts of the country have never even seen the picture." (Italics supplied.)

The Schwarz November 2, 1972 affirmation (p. 4) continued:

> "Defendant Parrish has absolutely no right to deprive the citizens of Los Angeles or New York or any other city of their right to see the motion picture because of a determination of obscenity in this court even if it had been after final trial. *Defendant Parrish surely has no such right based only on probable cause preliminary adversary determination in one court.*" (Italics supplied.)

Defendants did not and do not question that the standard at the adversary hearing was probable cause. The District Court and the Sixth Circuit did not question that the standard actually applied at the preliminary hearing was probable cause.

4. After the first film print was brought to the District Court under the compulsion of the order to show cause, Mr. Pleasants on May 30, 1972, appeared in the *United States v. School Girl* case and objected* to the proposed proceedings on the ground *inter alia* that the standard was probable cause and there were no statutory built-in safeguards. The motion was denied and, as stated, defendants successfully blocked any appeal.

5. As plaintiffs' petition stated (pp. 8 and 9), the decisions pre-*Heller* held that an adversary hearing was required for an evidentiary seizure of one copy of a film print. But the standard on the adversary hearing was probable cause. *Perial Amusement Corp. v. Morse*, 482 F. 2d 515, at 523 (2d Cir. June 1, 1973). See also, *Tyrone, Inc., supra*, 410 F. 2d at 641; adversary hearing not fully matured action at law; *Peachtree National Distributors, supra*, 456 F. 2d at 444.

B. There can be no suppression of a film until there is a final judgment after a full trial.

A standard of probable cause at an adversary hearing for a limited evidentiary seizure is one thing, *but a standard of probable cause may not be used under A Quantity of Books v. Kansas, 378 U. S. 205 (1964), to massive seizure which completely halts the nationwide distribution and exhibition of a motion picture film.*

As plaintiffs' petition stated, page 8, *Heller, supra*, 413 U. S. at 489, repeatedly cites *United States v. Thirty-Seven Photographs*, 402 U. S. 363 (1971), and *Freedman v. Maryland*, 380 U. S. 51 at 58, 59 (1965), and indeed in footnote 5 (413 U. S. at 489, n. 5) requotes *Freedman*

*We note there is no jurisdictional base for these show cause proceedings and while some courts have upheld them they have erred in doing so by inventing jurisdiction.

emphasizing that there cannot be any substantial restraint in advance of "a final judicial determination on the merits."

We add that *Heller* went on to point out that "Blue Movie" was held obscene following "a fully adversary trial" (413 U. S. at 490). *That fully adversary trial was the actual trial not a preliminary hearing. Paris Adult Theatre I v. Slaton*, 413 U. S. 49 at 55 (1973), held there could be "no restraint * * * until after a full adversary proceeding and a *final* judicial determination." (Italics supplied.)

The defendants' position validated by the Sixth Circuit was and is that after the adversary hearing determination "there exists no further rights under the First Amendment" and a seizure is permissible, no matter how massive, based on a preliminary evidentiary probable cause determination of obscenity.

We respectfully submit that that is completely wrong.

C. The direction to hold subject to subpoena adequately protected the Government.

The District Court October 6, 1972 ruling concerning the obligation of the firms and persons subpoenaed to retain in their actual or constructive possession prints and negatives and not to alter them and to keep a complete record of their whereabouts is set forth in the District Court opinion (App. C, p. 33). That October 6, 1972 ruling is referred to in the petition and this reply brief as the hold subject to subpoena order. Mr. Parrish's contention that these restrictions were unenforceable and unworkable (Parrish br., p. 8) is, we respectfully submit, completely specious.

No circumstances were changed between the October 6, 1972 ruling of the District Court and October 31, 1972, the date that the nationwide seizure commenced three weeks later. If the defendants had attempted in any fashion to follow and implement the October 6, 1972 ruling of the District Court instead of taking the law into their own hands they would have had no difficulty in obtaining the evidence by obviously less intrusive means.

The complaint (par. 11) alleged that Movielab, Inc., which held the master negative and a subdistributor and eight theatres among others had been served with subpoenas to produce the film material. Mr. Parrish (br., p. 8) states that since plaintiffs had not been served with the subpoenas it is therefore supposedly "difficult to conceive how anything done by the district court" with reference to the parties who were served could bind them.

Mr. Parrish is a very bright lawyer but the contention is absurd. A person or firm served with a subpoena is bound by the subpoena. It is obvious that the non-production of the film material by the firms actually served with the subpoenas was conditioned upon their compliance with the court ruling of October 6, 1972. If defendants had any doubt whatsoever as to whether these firms served with the subpoenas were bound by the October 6 1972 ruling the defendants could have asked the District Court for an order which would direct the persons served to appear in Tennessee unless they agreed to be bound by the terms of the court's October 6, 1972 ruling. The defendant did not do so because they were not interested in obtaining the evidence by the less intrusive means.

The defendants could have asked the District Court to make that or any other reasonable ruling for orderly scheduling of grand jury appearances.

Mr. Parrish then states that the parties subpoenaed, even assuming them bound, could allegedly "send the film to their wife * * * (thus) the chain of possession is (allegedly) lost."

But the court directed that the persons served keep the material in their constructive possession. Sending a print to one's wife who thereafter just ships it out to a third party is a patent sham. One of the exhibitors subpoenaed was Trans-Lux Theatre in Washington, D. C., 1,000 miles from Memphis; another was in California. There is no motive, reason, or gain for Trans-Lux or any exhibitor to become embroiled in contempt of court charges and obstruction of justice charges to benefit the distributor over one film print.

Mr. Parrish's brief (p. 8) then states that the District Court order would require persons "to provide incriminating evidence against them" and thus suggests without explicitly stating that the District Court order would be disobeyed because it violated self-incriminatory rights of the person subpoenaed. This solicitous concern for self-incrimination rights* however did not deter defendants in September, 1972, from serving the subpoenas in the first place. Passing for the moment the extent to which the corporations may or may not have self-incrimination rights where directed to produce films, it is also not unheard of to grant immunity.

Mr. Parrish's brief (p. 11) states that "to say the least" the seized prints represent not only violations of Sec-

*The only self-incrimination rights were those of firms which were compelled by the show cause order to incriminate themselves as a condition of exercising First Amendment rights which emphasized the lack of jurisdiction of the show cause order. However, that is not involved in this case.

tion 1462 but local violations throughout the country, and a return would allegedly "make impossible" prosecutions in other jurisdictions. This is a demonstration that defendants did not seize the material just for the investigation in Tennessee.

In closing we especially note that proof of interstate shipment did not require continuous possession of the negative, film prints and the containers.

The defendants were amply protected by the hold subject to subpoena order of the District Court.

POINT IV.

18 U.S.C. 371 is overbroad as applied to justify the seizure of the negative and film prints throughout the country.

(Reply to Parrish Brief—Point IV.)

A. The overbreadth of 18 U.S.C. 371 as applied to justify seizures is properly before this court as a First Amendment procedural question.

Mr. Parrish has framed his question 4 as follows (we paraphrase): Is 18 U. S. C. 371 facially or as applied unconstitutional so as to prohibit a conspiracy indictment charging distribution of obscene material throughout the United States?

Plaintiffs' petition Point II claims that 18 U. S. C. 371 as applied to justify seizures is overbroad. That question we submit is properly before this Court as a First Amendment procedural due process question. We

do not agree that the question must be cast as Mr. Parrish framed it.

Concededly, 18 U. S. C. 371 is not a seizure statute. But 18 U. S. C. 371 was the essential base when used and applied in connection with F. R. Crim. P. 41(e) to justify the seizures.

A preliminary hearing on a standard of probable cause was held to establish the right of the defendants to subject the film print to the execution of the search warrant. This was the application of a *procedural* rule for the purposes of establishing the right to seize one film print. **Defendants received the right to execute a search warrant to seize the print and then entered a "judgment."** Defendants thus used criminal procedural rules, and a "judgment" entered thereon in connection with 18 U. S. C. 371 as if it were a final judgment to justify nationwide seizures. While the film material has not been burned, that judgment completely blocked distribution for a long period of time. It is thus no different than the judgment in *Marcus v. Search Warrant*, 367 U. S. 717 (1961).

Statutes and Federal Rules used and applied to effectuate seizures of presumptively protected material by means which sweep too broadly violate procedural due process and the First Amendment. *Marcus, supra*, 367 U. S. at 733, 738.

The petition Point II procedural First Amendment seizure question is therefore properly before this Court particularly since the Sixth Circuit relied in part on Hamling v. United States, U. S. , 41 L. Ed. 2d 590 (1974), to *sustain nationwide seizures.*

Plaintiffs certainly believe that 18 U. S. C. 371 is facially and as applied overbroad and hence insufficient to support the conspiracy count of the indictment (a substantive law issue—Point IV-C, *infra*). Obviously, the arguments concerning indictment overbreadth and seizure overlap but the Court need not reach the substantive law issue in order to agree with plaintiffs' petition seizure Point II.*

B. 18 U.S.C. 371 as applied is overbroad to justify nationwide seizures and treat films as contraband and Mr. Parrish's own arguments confirm this.

The essence of the local community standard rule in the application of *Miller* test (a) and test (b) 413 U. S. 15 at 30-34 (1973) (herein called the local community standard rule or test) certainly makes it very clear that no *one* federal judge in one district may by a *preliminary* determination and "judgment" of obscenity authorize seizures of film throughout the United States and stop every adult from seeing the film.

That is a clear First Amendment violation and the new local standards rule emphasizes that First Amendment violation (Petition, Point II).

Mr. Parrish's brief (p. 23), states that the *Miller*, *Paris* and substantive law cases decided by this Court in June, 1973, show "an inclination not to distinguish offenses related to obscenity from any other type of criminal conduct," and the Parrish brief (pp. 26, 27 and 29), quoting from *United States v. Orito*, 413 U. S. 139 at 143 (1973), and citing *United States v. 12-200 Ft. Reels*, 413 U. S. 123 at 130, n. 7 (1973), emphasizes that the Government has

*Plaintiffs' petition Point II furnishes an additional reason for a return of the material: it is an issue which is not part of the criminal case.

an interest in preventing obscene material from *entering* the stream of commerce. (Italics that of Mr. Parrish.)

Mr. Parrish's reliance on the June, 1973, *Miller, et al.*, substantive law cases that this Court has shown "an inclination not to distinguish offenses related to obscenity from any other type of criminal conduct" *has absolutely nothing to do with the seizure point.*

Heller, supra, and *Roaden v. Kentucky*, 413 U. S. 496 (1973), continued the *Marcus, supra*, holding that for purposes of search and seizure presumptively protected material could not be equated with contraband. The Court may have shown an inclination to treat criminal obscenity like any other offense, *but not in the area of seizures.*

Even a final judgment of obscenity in Tennessee would not permit defendants to seize film prints as contraband throughout the country and stop, for example, citizens of San Francisco from seeing the film. If that is not so then the local community standards rule has no meaning.

Defendants surely do not have the right to use a preliminary "judgment" in Tennessee as the basis for seizing the film in San Francisco and every other community in the country, especially not in the light of a local community standards rule.

18 U. S. C. 371 as applied to justify seizures is overbroad.

C. 18 U.S.C. 371 is both overbroad and unduly vague as applied on a substantive as well as a procedural law basis.

18 U. S. C. 371 as applied is both overbroad, and unduly vague in the sense that there is no standard at all, and Mr. Parrish's detailed argument confirms this.

For convenience in reading this reply we attempt to summarize Mr. Parrish's argument concerning the meaning of *Hamling*, *supra*, and *Jenkins v. Georgia*, U. S. , 41 L. Ed. 2d 642 (1974).

Mr. Parrish says that *Hamling* and *Miller* and *Jenkins* did not hold that a precise geographical area is required (Parrish br., pp. 30, 31); that never is it required that the word "community" be considered in geographical terms (Parrish br., p. 32); that therefore it is allegedly "*immaterial* what is the proper means of expression by a local community as to what, if any, standards it (the local community) has concerning obscenity" (Parrish br., p. 33) (italics ours; parentheses supplied) because Congress under its commerce power has prohibited obscenity from entering the stream of commerce (Parrish br., pp. 33, 34, 35); that geographical considerations in community standards play no greater role than they do in the reasonable-person test in a civil tort suit (Parrish br., pp. 41, 42); that "the word 'community,' when used in the phrase 'contemporary community standards' is (allegedly) a superfluous relic which is confusing to the public at large, the judiciary and the bar" (Parrish br., p. 44) (parentheses supplied), and the nationwide seizures were appropriate and the conspiracy indictment count sufficient.

The conclusion which Mr. Parrish urges is completely at odds with the specific holding of *Miller*, and the First Amendment meaning of community standards for over fifty years before, under, and after a national standards rule. Under the First Amendment a community standards rule involves what the community accepts and tolerates, and what it finds objectionable, it involves change, it involves *diversity* of attitudes between different States and areas as to *what the particular community finds acceptable concerning depictions of sexual matters in terms of the needs, moral attitudes, beliefs, tastes, general welfare of the particular community where the material is exhibited or distributed. United States v. Kenworthy*, 209 F. 119 at 121 (S.D.N.Y. 1913); *Miller*, *supra*, 413 U. S. at 33; *Jacobellis v. Ohio*, 378 U. S. 184 at 200-201 (1964), dissenting opinion of former Chief Justice Warren quoted with *emphatic* approval on the community standards rule in *both Miller* and *Hamling*; *Cain v. Kentucky*, 397 U. S. 319, 319-320 (1970) (dissenting opinion of Chief Justice Burger cited with approval in *Miller*, *id.* at 33); *Roth v. United States*, 354 U. S. 476 at 505-506 (1957), concurring and dissenting opinion of Mr. Justice Harlan cited with approval in *Miller*, *id.* at 33. This is the essential guideline in the application of the local community standards rule.

The power of Congress to regulate the flow of obscene material is not at issue but rather whether that power is being exercised in conformity with the First Amendment. One basic premise underlying the exercise of that power in the area of obscenity specifically relied on in *Orito*, *supra*, 413 U. S. at 144, n. 6, citing *inter alia Brooks v. United States*, 267 U. S. 432, 436-437 (1925), and *Weber v. Freed*, 239 U. S. 325 (1915), is the Congressional power to control interstate shipments for exhibition into a par-

lucian State "*because of the demoralizing effect of such exhibition in the State of destination*, and *Orito, id.* at 144, n. 6, to stop immorality in the state where distribution occurs.

What Mr. Parrish is urging upon this Court is completely incompatible with the First Amendment application of the local community standards rule and makes it clear that 18 U. S. C. 371 as applied is both overbroad and unduly vague in the sense that there is no standard at all.

The essential conclusion which Mr. Parrish urges is to be found in the example that Mr. Parrish gives on pages 36-37 of his brief. For according to Mr. Parrish if the legislative bodies of Maine and New Hampshire abolish all consenting adult obscenity laws it is immaterial with reference to interstate shipments between those States. Furthermore, if a regional subdistributor and two exhibitors ship a film between Maine and New Hampshire and have absolutely nothing to do with any shipment into Tennessee or an agreement to ship to Tennessee, nonetheless according to Mr. Parrish, those parties can be indicted in Tennessee for a conspiracy because the same film was distributed nationwide and also in Tennessee. Though the names of the States may be different that is exactly what happened in this case.

Let us assume, as Mr. Parrish does, that Maine and New Hampshire abolish all obscenity laws. Let us further assume for the sake of demonstrating our legal argument that every adult in both States certifies to the legislative body (i) that they have examined sexually explicit material and find as a matter of fact that no depiction of sexually-oriented material is patently offensive, and (ii) that they have read the 1913 decision of Judge Learned

Hand in *United States v. Kennerley, supra*, 209 F. at 121, and that their communities have determined that the "critical point in the compromise between candor and shame" (*id.* at 121, Judge Hand) at which *their* communities have presently arrived at is that no depictions are "shocking to the public taste" and in *their "development* of general notions of what is decent" (*id.* at 121, italics supplied) they elect to eliminate all obscenity laws.

Nonetheless according to Mr. Parrish the citizens of Maine and New Hampshire can be indicted and convicted in Memphis, Tennessee by a Memphis jury for what those citizens exhibited in Maine and New Hampshire, not for what they did in Tennessee.

This is completely contrary not only to Judge Hand's decision in *Kennerley*, but to *Miller* and the entire line of cases that *Miller* relied on in rejecting a national community standards rule.

While our example of every citizen certifying, etc., will not happen the diversity was and is present. There is no enforcement in certain local areas, obviously by choice, and North Carolina, for example, by new statute bans only actual depictions of sexual acts and does not try to regulate simulated depictions.

We turn to one of the First Amendment essentials of community standard rule, the *diversity of different communities* (State or lesser area) *in determining what is acceptable.*

Miller said, 413 U. S. at 33:

> *"People in different States vary in their tastes and attitudes,* and this *diversity is not to be strangled by the absolutism of imposed uniformity."*

Both *Miller* and *Manuel*, 41 L. Ed. 2d at 614, cited with emphatic approval and quoted from the dissenting opinion of Mr. Justice Warren in *Jacobellis*, *supra*, 378 U. S. at 200-201. The former Chief Justice said:

> "But communities throughout the Nation are in fact diverse * * * in cases such as this one (i. e., obscenity cases) the Court *is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.*" (Parentheses and italics supplied.)

In *Cain v. Kentucky*, *supra*, 397 U. S. 319, Chief Justice Burger said:

> "In my view we should not inflexibly deny to each of the *States* the power to adopt and enforce its *own standards as to obscenity* and pornographic materials; States ought to be free to deal with varying conditions and problems in this area. I am unwilling to say that Kentucky is without power to bar public showing of this film; therefore, I would affirm the judgment from which the appeal is taken."

Miller, 413 U. S. at 33, also *cites with approval* the concurring and dissenting opinion of Mr. Justice Harlan in *Roth*, *supra*, 354 U. S. at 505-506.

Mr. Justice Harlan said with reference to the federal obscenity statute: "Different States will have *different attitudes*" (*id.* at 505); there is no overwhelming danger "*so long as other States are free to experiment*" (*id.* at 506); however, with federal control there is danger that "*the prerogatives of the States to differ on their ideas of morality will be destroyed*" (*id.* at 506); and their ability to experiment stunted (*id.* at 506). (Italics supplied.)

United States v. 12 200-Ft. Reels, supra, held (413 U. S. at 129, 130) that the standards for testing the constitutionality of State legislation "*are applicable* to federal legislation," not the other way around.

Mr. Parrish's analogy of obscenity laws to gambling laws and other federal criminal offenses is completely off the mark in a First Amendment obscenity case. In obscenity, in the application of old and new test (a) and (b), evidence that other similar material is sold and accepted* is an essential element of whether the particular material before the Court is obscene. *In no other crime that we know of does guilt as a matter of fact, or law, turn on what other people do or what is accepted.*

If a local speeding law is 55 miles per hour it is immaterial that the community tolerates and accepts 65 miles per hour. As a matter of law the fact of 65 miles an hour acceptance is irrelevant. In the community standards test what everyone accepts is the First Amendment *sine qua non* of the application of the community standards rule.

Even in negligence cases, with its reasonable or ordinarily-prudent-man test, usage and custom no matter how long continued do not justify negligence. The standard of care for the reasonable man may be higher than that which everybody follows, 57 Am. Jur. 2d, Negligence, Section 78. That is not so in the application of the community standards rule. And negligence cases do not involve either jail or the First Amendment.

The essence of the local community standards rule involves (i) diversity among different communities and (ii)

*Defendant must show reasonable degree of actual acceptance.

the fact that the obscenity is to be tested by the standards of that particular community. On that basis alone 18 U. S. C. 371 as applied is patently overbroad. That conclusion is fortified by one of the policy reasons set forth in *Orito, supra*, 413 U. S. at 144, n. 6, for the exercise of federal power.

Furthermore, the standard Mr. Parrish urges is no standard at all and hence is also unduly vague. *See Smith v. Goguen*, 415 U. S. 566 at 573 (1974).

Jenkins, supra, 41 L. Ed. 2d at 648, held it is "constitutionally permissible to permit juries to rely on the understanding of the community from which they came," acc'd *Hamling*, 41 L. Ed. 2d at 613, "to permit a juror * * * to draw on knowledge of the community * * * from which he comes," to avoid (*id.* at 614) merely personal opinion.

According to the Parrish brief (p. 40), this will be accomplished without any reference to any area because of our "highly mobile society." On that premise this Court might as well re-adopt a national standards rule. It is totally unrealistic and completely unsound to expect that a Memphis jury could know or apply standards of fifty different States.

Hamling, id. at 614, said that a District Court would be "at liberty to admit evidence of standards existing" in some place outside the particular district of trial if helpful. But that statement was made in the context of that case and had reference to *defense* evidence. The Government has no burden of proving what the local standards are. *Paris Adult Theatre I v. Slaton, supra*, 413 U. S. at 56. So a prima facie case goes to a Memphis jury

who are supposed to know and apply the standards of 50 states and 195 communities. *That is no standard at all.*

Hamling and *Jenkins*, *supra*, were answering the particular issues before the Court. We submit those cases may not be read to permit a formulation, guideline or indictment which is contrary to the purpose and meaning of the local community standards rule and totally eliminates it.

Mr. Parrish urges that the word community insofar as it connotes any geographical area is confusing to the bar and to the public and gives fodder to defense counsel.

We suggest that while a state may not be required to define a specific geographical area virtually everybody, lawyers, law enforcement officials, judges and the average citizen have interpreted this Court's decision as turning control back to the local areas. There is no confusion in applying that rule in a federal case. Everybody understands it. "It makes sense that if the material is acceptable in a particular community that it is acceptable in terms of interstate shipment." Such a rule would promote much greater clarity and guidance for everyone concerned than the nonstandard which Mr. Parrish urges upon this Court.

---

*It may be noted that before *Miller* a bill was introduced in Congress (S-193rd Congress) which made the federal statute turn directly on whether the material was patently offensive in a place where shown. While this bill has not been acted on it certainly indicates that someone in Congress does not view the matter of local control as engendering confusion as Mr. Parrish claims, and the Court may consider the wise holding of Mr. Justice Harlan in *Manual Enterprises, Inc., v. Day*, 370 U. S. 478 at 488 (1962), that a community standards test cannot be applied without first deciding the relevant community.

What plaintiffs urge is consistent with the First Amendment and federal control and does justice to both.

18 U. S. C. 371 is both overbroad and unduly vague as applied to the conspiracy count of the indictment and it should be dismissed.

CONCLUSION.

The writ of certiorari should be granted.

Respectfully submitted.

Ralph J. Schwarz, Jr.
22 East 40th Street,
New York, N. Y. 10016
(212) MU 6-8160.

Ephraim C. Granger, Jr.
501 Fifth Avenue,
New York, N. Y. 10017
(212) 697-2710.

Ferguson M. Graves, Jr., and Michael F. Pleasants,
2020 First National Bank Building,
Memphis, Tenn. 38103
(901) 525-8231.

Attorneys for Petitioners.